TOPICAL INDEX TO PETITION FOR WRIT OF CERTIORARI.

TOPICAL INDEX OF BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Cases Cited.

In the Supreme Court of the United States

October Term, 1947.

A. PHILLIP RANDOLPH and MILTON P. WEBSTER, individually and as International President and First International Vice-President of the Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants; WILLIAM P. ORR, O. S. SCARBOROUGH, SR., W. E. MCCANLESS, W. S. DAVIS, W. H. MERRILL, C. W. JONES and C. E. HARVEY, individually and as class plaintiffs of the class herein called Train Porters, and BROTHERHOOD OF SLEEPING CAR PORTERS, TRAIN, CHAIR CAR, COACH PORTERS AND ATTENDANTS, an unincorporated labor union, and LOCAL TRAIN PORTERS UNION NO. 3, a union of Train Porters employed by the two railroad companies herein made defendants, which is likewise an unincorporated local union, all as represented by the foregoing class plaintiffs, *Petitioners*,

VS.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, a Missouri railroad corporation, and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY of Texas, a Texas Corporation, and E. R. BRYAN, General Chairman Brotherhood of Railroad Trainmen, Missouri-Kansas-Texas Lines, R. D. Wood, Vice-General Chairman of the Brotherhood of Railroad Trainmen, Missouri-Kansas-Texas Lines, ROY ELLIOTT LANG, Local Chairman, First District, Brotherhood of Railroad Trainmen, Missouri-Kansas-Texas Lines, JOHN WILLIAM DEARING, President of the Local Lodge, Brotherhood of Railroad Trainmen, Missouri-Kansas-Texas Lines, HOLLIS ORVAL THOMPSON, Local Chairman 2nd District, Secretary-Treasurer of Local Lodge, Brotherhood of Railroad Trainmen, Missouri-Kansas-Texas Lines, individually and as class representatives of said Brotherhood of Railroad Trainmen on the railroad system of the two defendant railroad companies; and BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated labor union as represented by the foregoing named members of the class defendants, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

(Figures in parentheses are, unless otherwise indicated, pages of the printed record.)

Petitioners, A. Phillip Randolph, *et al.*, individually and and in their representative capacities, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered November 5, 1947 (705), reversing the judgment of the District Court of the United States for the Western District of Missouri, which later judgment on January 20, 1947, granted to petitioners a temporary injunction (160).

Opinions Below.

The opinion of the Court of Appeals has not yet been published but it appears in the printed record at pages 695 and following. The opinion of the District Court (160) is reported, *Randolph* v. *Missouri-Kansas-Texas Railway Co.*, 68 Fed. Sup. 1007.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, Section 344, Judicial Code as amended Section 237.

The petition for certiorari has been timely presented. Petitioners, in proper time, form and substance filed their petition for rehearing on November 19, 1947 (709), which said petition was by the court overruled December 17, 1947 (715). This petition, brief in support thereof and

printed record are being filed in the office of the Clerk of the Supreme Court of the United States and the case is being docketed within three months of said last named date.

Summary Statement of the Matter Involved.

For brevity we adopt the following nomenclature:

By *train porters* is meant train, chair car, coach porters and attendants employed by defendant carriers who are members of the Labor Union, Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants.

By *trainmen* is meant Brotherhood of Railroad Trainmen and members thereof employed by defendant carriers.

By *defendant carriers* is meant Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas.

By *services in controversy* is meant the six classes of service here in dispute which are specified in the Court's finding of fact No. 1, page 108.

The Decisions of the District Court and of the United States Circuit Court of Appeals.

The District Court, at the suit of the Porters, restrained the trainmen from interfering with and inducing and coercing the Carriers to repudiate, abrogate and cancel a contract between the Carriers and the Porters, providing for certain work to be done by the Porters (160-634). This was upon the ground that the Trainmen were guilty of a common law tort, in that by illegal means they sought to coerce the Carriers to terminate the contract between the Porters and the Carriers, to which the Trainmen were not parties, and upon the ground that if such illegal action

was not restrained the Porters would suffer irreparable damage (646).

The Court of Appeals reversed the judgment of the District Court with instructions to that court to dissolve the injunction on the ground that the Porters had an adequate and sufficiency remedy by proceedings under the Railway Labor Act, particularly Section 3 First (i), exhaustion of which, by the Porters, was a prerequisite to resort to equity. The decision of the Court of Appeals was based upon its interpretation of the decision in *Order of Conductors* v. *Pitney*, 326 U. S. 561, dealing with said Section 3 First (i) of the Railway Labor Act (696).

STATEMENT OF ESSENTIAL FACTS.

The District Court made extended findings of facts and gave declarations of law (108-115-133). There was no conflict of evidence on any material issue covered by the findings.

For more than forty years, on the system of the Carriers, the Train Porters, pursuant to contract and custom, by the parties made part of the contract, between them and the Carriers, have consistently and without interruption performed the services in question (109).

Neither the Brotherhood of Railroad Trainmen nor the members thereof, have now, nor have they ever had, a contract, written or oral, with the defendant Carriers, giving the Trainmen the exclusive right to perform any of said services. Nor have the Trainmen, pursuant to any practice or custom, during said forty years, exclusively performed such service. The custom and practice, for at least forty years, has been directly to the contrary. There is no conflict of evidence upon these questions (109-10-115-133).

Prior to 1946, and for a period of forty years, the Trainmen, being fully cognizant, acquiesced in and did not protest against the performance by the Porters of the services in controversy (Finding IV, p. 110).

Early in 1946, the Trainmen, acting through an agent thereunto authorized by the Trainmen, demanded that the Carriers terminate said contract with the Porters and take from the Porters the performance of any of said services in controversy and the Trainmen threatened that unless within ten days thereafter the Carriers complied with said demands, then in each instance, where a Porter performed any act falling within the services in controversy, a Trainman would file a claim against the Carrier for a full day's

pay of a Trainman on the run in question, even though another Trainman had served upon and been paid for such run and even though the act performed by the Porter was a single act such as throwing a switch (111-208-9-10).

This threat was not of a single and comprehensive proceeding, under the Railway Labor Act, by the Trainmen, to have the status and rights of the various parties fixed, determined and enforced, but it was a threat of separate filing by an individual Trainman, in every instance in which a Porter performed any single act connected with the service in controversy claims by the thousand (208-9-10).

Over 600 of such claims were actually filed by individual Trainmen, prior to the issuance of the restraining order. The representative of the Trainmen, on the witness stand, stated that if not prevented by injunctive orders the Trainmen would file, continue to file and cause to be filed such claims in every instance where any Porter, on any passenger train, performed even a single act of the services in controversy, and that such filing would continue until the Carriers took all such work away from the Train Porters and gave it exclusively to the Trainmen. The evidence shows that up to the time of the trial, such claims, figured upon the basis stated, would amount to more than $150,000. The Trainmen, in connection with the demand, called attention of the Carriers to the fact that on the Southern Pacific system the Trainmen had taken a strike vote, because that road had refused to take similar work away from its Porters and give it to its Trainmen.

Throughout the years the services of the Porters had been entirely satisfactory to the Carriers and the Carriers had been entirely content with the contract and practice thereunder with the Porters. And the Carriers desired to continue such contract indefinitely and would do so if it

were not for the pressure being brought on the Carriers by the Trainmen. Mr. Campbell, for the Carriers, said to the Porters that the Brotherhood of Railroad Trainmen was a powerful economic factor and that the Carriers could not financially stand a controversy with them in the premises, particularly in respect to the vast number of claims filed and threatened to be filed by the Trainmen in enormous amount; that the situation was pathetic from the standpoint of the Porters, but that the Carriers were powerless to do otherwise than to accede to the demands of the Trainmen, to cancel the contract and take the work of the Porters from them and give the same, together with pay therefor, to the Trainmen (112-113).

The Carriers accordingly served notice upon the Porters of their intention to cancel the contract with the Porters, abolish the practice pursuant to the contract and to give such work to the Trainmen (242).

The effective date of such action by the Carriers was the 30th day of June, 1946. The restraining order was issued the 24th day of June, 1946.

The court found that the acts of the Trainmen were malicious in the sense of the doing of a wrongful act without lawful justification or excuse (114). The court, as a matter of law, declared:

> "The Court declares the law to be that such conduct (conduct of the Trainmen) is inequitable, oppressive and unlawful, and such conduct, irreparable injury being present and an adequate remedy at law being absent, should be enjoined." (Declaration of Law I, p. 114.)

The court further declared:

> "Plaintiff's petition states and the evidence establishes a cause of action at common law, which is not dependent on, nor is it limited by the provisions of the Railway Labor Act." (Declaration II, page 114.)

The court also declared:

> "The court declares the law to be that the acts and conduct of the defendants as recited in the findings of fact, constitute fraud and duress and are a common law tort on account of which plaintiffs are entitled to injunctive relief." (Declaration III, p. 114.)

The court also declared the law to be:

> "The jurisdiction of this court is based alone on diversity of citizenship. It is not invoked nor based upon any contention by plaintiffs, nor does plaintiff's petition disclose, that it is a suit arising under the laws and constitution of the United States." (Declaration VI, p. 114.)

The court further declared that:

> "In the construction of the written contract between the Porters and the Carriers and the contract between the Trainmen and the Carriers, it was the duty of the court to take into consideration and give due weight to the prior contractual relationship of the parties, and any uniform and uninterrupted practice and custom of the parties in relation to the subject matter, and to consider and give weight to the practical and day-to-day construction that the parties put upon the contract after the same was entered into." (Declaration IV, p. 114.)

The court also declared that considering the terms of the contract and giving proper weight to the principles and canons of construction, the court found that the services in controversy fell within the provisions of the written contract of December 1, 1928, and that said contract, as did previous contracts, embraced the services in controversy. (Declaration IV, p. 114.)

Membership of Divisions of the Adjustment Board.

The threats by the Trainmen were to file said claims before the First Division of the National Railroad Adjustment Board (Title 45, 153, First (h)). Said Board consists of ten members, five of whom are selected by the Carriers and five are selected and paid by seven labor unions, whose members are subject to the jurisdiction of said Division. Said First Division has jurisdiction of Trainmen and *the Brotherhood of Railroad Trainmen is one of the seven unions that selects the five labor members.* The Porters' union has no voice whatever in such election. Title 45, Sec. 151 and following.

The Porters are all Negroes. For many years Negroes have been consistently, uniformly and without exception excluded from membership in the unions which name the five labor representatives on the First Division (484, 582, 598).

Hence, in any proceeding before said Division the rights of the Porters as against the Trainmen and the Carriers would be considered and decided by a court of ten members, five of whom are named *and paid* by seven unions of which seven the Brotherhood of Railroad Trainmen is one, and before a board, five members are appointed by unions which are prejudiced against Negroes in railway service.

Questions Presented.

I.

Where there is a contract plain, clear and understandable between the Carrier and the Railroad Union; and where there is no dispute between the parties to the contract as to the existence, meaning, scope and effect of said contract; and where both parties are satisfied therewith

and desire the same to continue; and where the plaintiff makes out a case entitling him to an injunction under the general principle of equity jurisprudence, should the equity court withhold its injunctive process until the plaintiff exhausts a proceeding under Section 3, First (i) of the Railway Labor Act or other provisions thereof?

II.

Where, in a dispute between two unions as to which is entitled to given work under a contract, the factual question is not intricate or technical, and where there is involved no more than the construction of contracts and uniform custom made a part of the contract by the parties, "in terms of the ordinary meaning of words and their position" (*Order of Conductors* v. *Pitney*, 326 U. S., l. c. 567), is resort to Administrative remedy under the Act "prerequisite to equitable relief in the federal courts" (*Tunstall* v. *Brotherhood of Engineers*, 323 U. S. 1. c. 213) when failure of equity to act will work irreparable injury?

III.

Does Section 3, First (i) of the Railway Labor Act require a proceeding before the Adjustment Board to settle a dispute between the plaintiff employees and the carrier employer, growing out of the interpretation and application of a contract between the parties when there is no dispute between the parties as to the existence, meaning and effect of their existing contract, before equity will intervene?

IV.

Where one union must apply to Division I of the Railroad Adjustment Board to which another union cannot be

made a party and where the other union must apply to Division IV of the Board in a proceeding to which the first union cannot be made a party, is there an adequate administrative remedy available to either union concerning a dispute between the unions?

V.

When two parties such as the Porters' union and the Carriers have an existing contract, concerning the meaning, scope and effect of which there is no dispute and which contract the parties desire to continue in effect, then if a third person, not a party to the contract, seeks to interfere with and induce one party to breach the contract by threats, intimidation and oppressive action, may such a third person be enjoined from such activity where irreparable injury is involved?

VI.

Where plaintiff bases his cause of action on the common law and does not seek nor assert any right, title or interest arising under the Railway Labor Act and where the wrong alleged is a common law tort, is there any administrative remedy under the provisions of the Railway Labor Act which plaintiff must exhaust before resorting to equity?

VII.

On the question of adequacy of administrative remedy available to the Porters:

A. Can any trial or administrative procedure, which does not measure up to the fullest requirements of the constitutional right of fair trial, constitute such a remedy as will oust a court of equity from its authority to issue injunction or other equitable process in the premises?

B. Can a trial or proceeding before an Adjustment Board, five of whose members are appointed and paid by seven unions, where the rights and interests of one of said seven unions are involved as against the rights of others, be a fair and adequate remedy ousting equity of jurisdiction?

C. Can a court or a board afford fair trial to a Negro litigant where five members thereof are appointed and paid by labor organizations that will not admit Negroes to membership therein?

D. Can a court or board afford a fair trial to a Negro Porter where one-half of the members of said court or board are appointed and paid by unions who believe that Negroes should not perform any service in actual transportation and train movement?

Reasons Relied Upon for Allowance of the Writ.

I.

The rulings by the Circuit Court of Appeals and its reasons therefor are of importance that transcends the rights of the individual litigants. The Porters are a large class, active in operation of passenger trains upon the entire railroad system of the United States, their services affecting the traveling public. If the opinion of the Court of Appeals is to prevail the immediate result will be that many of the Porters will lose their jobs, those that remain will have their hours lengthened and wages decreased, their seniority will be affected and they will otherwise suffer irreparable injury. The Court of Appeals has decided that they, *and those in like plight,* have no remedy in equity, no matter how grievous their wrongs. Under what circumstances do the members of a railway union have an administrative remedy? If so, when is such rem-

edy adequate—when is the exhaustion of such remedy a prerequisite to proceeding in equity?

When a class, any class, of railway employees finds itself in the dire straits shown by the record in this case, justice requires that there be authoritative decision by the Supreme Court of the United States, marking the path to be traveled that the employees may attain justice and redress of wrongs. To settle judicial confusion upon these most important phases of this most important Act, we respectfully urge the issuance of the writ.

II.

The Court of Appeals has widely departed from the fundamental requirements of fair trial in that it has held that a proceeding before an Adjustment Board, five of whose members are appointed and paid by seven unions, where the rights and interests of one of said seven unions are involved as against the rights of others, constitutes a fair and adequate remedy ousting a court of equity jurisdiction.

III.

The Court of Appeals has held that a Negro litigant is afforded a fair trial by a proceeding before a Board, five of whose members are appointed and paid by labor organizations that will not admit Negroes to membership therein.

IV.

The Court of Appeals has held that a Negro Porter may have a fair and adequate trial before a Board, where one-half of the members of said Board are appointed and paid by unions who believe as union policy that Negroes should not perform any services in actual transportation and train movement.

In the foregoing reasons (2-4) there is presented a situation of the gravest import. Nothing transcends the importance of what constitutes a fair trial and whether, under given circumstances, it has been afforded. The cases of *Hill* v. *Texas,* 316 U. S. 400, 406, 62 S. Ct. 1159, 1162, and *Patton* v. *Mississippi,* 68 S. Ct. 184; *Steele* v. *Ry. Co.,* 323 U. S. 192, l. c. 206, are typical cases. We urge that the decision of the Court of Appeals in this respect be brought before the Supreme Court for review of the element of fair trial.

V.

The decision of the Court of Appeals is in conflict with decisions by the Supreme Court of the United States among which decisions are *Steele* v. *Louisville Ry. Co.,* 323 U. S. 185, 65 S. Ct. 226; *Tunstall* v. *Locomotive Firemen,* 323 U. S. 210, 65 S. Ct. 325; *Moore* v. *Illinois Central Railroad Co.,* 312 U. S. 360, 61 S. Ct. 754; *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, 66 S. Ct. 322.

VI.

The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter. Notably, *Gaskill* v. *Roth* (8 C. C. A.), 151 Fed. (2) 366; *Washington Terminal Company* v. *Boswell,* 124 Fed (2) 235 l. c. 249; *Southern Railway* v. *Order of Railway Conductors,* 63 Fed. Sup. 306.

VII.

The Court of Appeals decision is likewise in conflict with State decisions on the same subject, *Evans* v. *Louisville Ry. Co.* (Supreme Court of Georgia), 12 S. E. (2) 611; *Delaware Ry. Co.* v. *Slocum,* 50 N. Y. Sup. (2) 313.

VIII.

The Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court in that the Court of Appeals has ruled in effect that a court of equity will not issue its process in reference to any subject matter covered by the Railway Labor Act until after exhaustion of procedure under said act regardless of the existence or adequacy of an asserted administrative procedure under the Act.

IX.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of the Supreme Court of supervision in that the court has denied an injunction under admitted facts and circumstances entitling the parties to injunctions and other equitable processes under settled principles of equitable jurisprudence.

Conclusion.

Wherefore and by reason of all which Petitioners respectfully pray that this Court shall issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

CLIF LANGSDALE,
CLYDE TAYLOR,
Attorneys for Petitioners.

In the Supreme Court of the United States

October Term, 1947.

A. PHILLIP RANDOLPH, ET AL., in their individual representative capacities, *Petitioners,*

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS AND E. R. BRYAN, ET AL., in their individual and representative capacities, *Respondents.*

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

The petition for the writ of certiorari contains, so that there is not here repeated, the following:

(a) Reference to the report of the decision below.

(b) Statement of the grounds on which the jurisdiction of this Court is invoked.

(c) A concise statement of the case containing all that is material to the consideration of the questions presented.

(d) Questions presented.

(e) Reasons relied upon for the issuance of the writ.

There is in this brief presented:

(a) Specification of the assigned errors.

(b) Further specifications of the grounds and reasons for the Court to exercise its discretion for the issuance of the writ.

(c) Citation analyses of decisions by the Supreme Court of the United States and by other Circuit Courts of Appeal and State Courts with which the decision below is in conflict.

(d) Argument.

II.

Specification of the Assigned Errors Intended to Be Urged.

1.

The Court of Appeals fundamentally erred in holding that the Porters had an adequate administrative remedy under the Railway Labor Act and for that reason equity should stay the issuance of process.

2.

Such holding was erroneous for the reason that the Porters have no administrative remedy under any of the provisions of said Railway Labor Act.

3.

The Court of Appeals erroneously held that this was a proceeding under the provisions of the Railway Labor Act in which the plaintiffs were asserting rights, titles and interests by reason of said Act, whereas the cause of action is a common law cause of action in nowise dependent upon or derived from the Railway Labor Act.

4.

The Court of Appeals erred in holding that the Porters could have a fair trial before the Railroad Adjustment Board whereas five of the ten members of said Board are named by seven Unions, one of which is the Trainmen. Moreover, five of the ten members of said Board are named and paid by Railway Unions who will not permit Negroes to become members thereof, and who believe as a Union principle that Negroes should not be permitted to perform Railroad work.

The general factual situation and historical background of the litigation, against which legal principles are to be applied, may, we think, be profitably reviewed in a statement prefatory to the brief and argument.

III.

Preface to Brief and Argument.

This is the story of an appeal to equity by the Porters, to protect their jobs, held under a contract with the Carriers and a uniform, continuing and consistent custom and practice made a part of the contract by the parties, which contract now exists and has existed for more than forty years (Finding XXIII, p. 109). The appeal to equity is for relief against a determined and malicious (the court found it to be malicious, Declaration 1, p. 114) assault by the Trainmen, who by threats, fraud and duress (Finding VI, p. 111) are inducing and coercing the Carriers, against the Carriers' will, to abrogate the Carriers' contract with the Porters and to take the Porters' jobs and pay therefor from them and give them exclusively to the Trainmen.

The Carriers have been and are satisfied with the services being rendered and which for forty years have

been rendered by the Porters under the contract. The Carriers desire to continue such contract, custom and practice with the Porters and would do so if it were not for the unlawful pressure upon the Carriers by the Trainmen (Finding VIII, p. 112).

There is *no evidence whatever* (Finding V, p. 110) that the Trainmen have or ever have had the exclusive right to the jobs in question, by contract, written or oral, or by custom or practice. The court's finding to that effect stands unchallenged by any evidence to the contrary.

The District Court restrained the Trainmen from interfering and inducing and coercing the Carriers to repudiate, abrogate, cancel or violate the Carrier's contract with the Porters (163).

The Court of Appeals reversed the judgment of the District Court with instructions to dissolve the injunction on the ground that the Porters had an adequate and sufficient remedy by proceedings under the Railway Labor Act, and that exhaustion by the Porters of such proceedings was a prerequisite to resort to equity The action of the Court of Appeals was based upon its construction of the decision in *Order of Conductors* v. *Pitney,* 326 U. S. 561, dealing with Sec. 3 First (i) of the Railway Labor Act.

The Porters cannot resort to the Adjustment Board under said Section, for the manifest reason that there is no dispute or controversy between them and their employer as to the interpretation or application of the agreement between them.

Even if the Porters could have applied to the Adjustment Board they could not have a fair trial before the Board, because five of the ten members of the said Board are named and paid by seven unions of which the Trainmen are one, and because said seven unions, so naming

said five members of the Board, are prejudiced against Negroes and will not admit them to their unions.

The factual question involved in this case is simple; in fact it may be properly said that there *is* no material, factual issue. This is not a case where "The factual question is intricate and technical." It is not a case where interpretation of contract involves more than the mere construction of written instruments in terms of ordinary meaning and the application of undisputed evidence as to uniform, undeviating and long-continued custom, which by the parties have been made a part of the contract. (*Pitney case,* 326 U. S. 561). A court of equity is as well adapted as any administrative board, in fact more so, to decide the very rights of the parties and to protect and enforce such rights by well-known and effective process not available to any administrative board.

The injury to the Porters, if denied equitable relief, is cruel and irreparable. The court found that if they were not afforded injunctive relief they would suffer immediate and irreparable damage without adequate remedy at law (Finding X, p. 113).

Many of the Porters, some of whom have served more than forty years, would lose their jobs; those remaining in the service would have their hours increased and rates of pay decreased; they would have their pension rights reduced; their seniority rights would be impaired; they would no longer be subject to the limitations of the 16-hour continuous service law (Title 45, U. S. C. A., Sec. 2) (113-478-9).

Most of the Porters are unskilled in any work except that being performed by them as Porters, including the services in question. The Porters are all Negroes and no Negro is eligible to membership in any Railroad Union except their own. They cannot transfer to other railroad jobs (598-484-582).

BRIEF.

The Court of Appeals has ruled that the Porters are not entitled to equity process because they have an adequate administrative remedy before the Adjustment Board. The Porters have no administrative remedy for the reason they cannot obtain a fair trial before such Board, because of the interest and racial prejudice of the members of said Board against the Porters and in favor of the Trainmen.

IV.

Aside from all other questions and regardless of every other consideration, the Porters cannot have a fair trial vouchsafed to them by the *constitution, because five of the ten* members of the Adjustment Board are appointed and paid by seven Railway Unions, one of which Unions is the Trainmen.

That is to say, that the real opponent of the Porters, to-wit, the Trainmen, acting jointly with six other unions, name five of the ten judges that are to pass on the Trainmen's case. Moreover, all the seven unions, who name and pay five of the judges, are prejudiced against Negroes and will not admit Negroes to membership in their unions (598-485-582). The Constitution of the Trainmen Union expressly bars Negroes (582). Moreover, of the seven unions that name the five judges, believe and proclaim that Negroes should not perform any service in actual transportation and train movement.

Manifestly, no trial or administrative procedure which does not measure up to the fullest requirements of the Constitutional right of fair trial, can afford such a remedy as will oust a court of equity from its authority to issue injunctive or other equitable process.

It is fundamental, it requires no argument, to demonstrate that the very essence of fair trial, described in varying terms such as law of the land, due process, fair trial, but always meaning essentially the same thing, from the time the Magna Charta through the English Bill of Rights and English Petition of Right and the Bill of Rights, amendatory to the Constitution of the United States, is a trial before an impartial and disinterested judge. A trial before a judge who has a personal interest in the outcome thereof is no fair trial.

Precisely the same things may be said with respect to a prejudiced judge, and of all prejudice racial prejudice is the climax. A trial of a Negro before a judge who has racial prejudice against him is no trial.

Long citation is unnecessary. The decisions by the Supreme Court in *Hill* v. *Texas*, 316 U. S. 400, 406, 62 S. Ct. 1159, 1162; *Patton* v. *Mississippi*, 68 S. Ct. 184; *Steele* v. *Ry. Co.*, 323 U. S. 182, l. c. 206, are typical cases.

V.

The Court of Equity Has Jurisdiction in this Case to Issue Injunction Notwithstanding Alleged Administrative Remedy Under the Railway Labor Act.

The Railway Labor Act does not expressly withdraw or restrict jurisdiction of a court of equity in any respect whatever. Unlike the Norris-LaGuardia Act, jurisdiction is not in terms denied to equity in any respect. Where equity has withheld its process on matters subject to the Act it has not been upon the ground that equity was without jurisdiction in the premises, but because in particular instances the plaintiff has had an adequate administrative remedy under the Act. Such withholding is nothing but an application of the ancient doctrine that

equity, though it have jurisdiction, will not afford its process where there is an adequate remedy at law. This is made exceedingly clear by the action of the Supreme Court in the *Pitney case* (326 U. S. 561). Had the court conceived that equity was without jurisdiction, the petition would have been dismissed, as ordered by the lower court. But the Court ordered the case retained in equity to give an opportunity for proceedings under the Railway Act.

> "The dismissal of the cause should therefore be stayed by the District Court so as to give an opportunity for application to the adjustment body for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding." (326 U. S., l. c. 325.)

Therefore, the question is not whether the plaintiff has a remedy under the Act, but whether such remedy is adequate under the particular circumstances of each given case. Since equity does have jurisdiction, it will withhold its process only where there is a plain and adequate administrative remedy under the Act. If that remedy be not adequate, process will issue. The Supreme Court, notably in the *Steele case,* 323 U. S. 192, and *Tunstall,* 323 U. S. 210, and other courts sitting in equity have issued equitable process, notably injunctions, where the party did have an administrative remedy under the Act but where the court held that such remedy was not adequate. Even in the *Pitney case,* where it was held that the administrative remedies were sufficient to meet the situation and therefore equitable process should be withheld, it was none the less recognized and declared that equity would intervene without prior proceedings under the Act where the necessity to protect the interest of individuals or the public was clearly shown.

> "Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown a court of equity could in a proper case intervene." (326 U. S. 561, l. c. 466.)

There is no case holding that a court of equity may not under any circumstances intervene where there is a remedy under the Act.

It is our submission that in this case the Porters had no remedy at all or, at most, a totally inadequate remedy by any conceivable proceeding under the Railway Act and that, hence, equity not only has jurisdiction, but should issue its process.

VI

Cases With Which the Decision Below Is in Conflict.

In *Moore versus Illinois Central Railroad Company,* 312 U. S. 630, 61 S. Ct. 754, the plaintiff, a railroad employee, brought suit against the company based upon a collective bargaining agreement between the plaintiff's union and the railroad. There was dispute and controversy as to the meaning, scope and effect of such contract. The railroad contended that Moore's suit was prematurely brought because the plaintiff had not exhausted his administrative remedy granted him by the Railway Labor Act particularly under Sec. 3 First (i). The court said:

> "But respondent says there is another reason why the judgment in its favor should be sustained. This reason, according to the respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit

was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C. A. 151. But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in the court. In support of its contention the Railroad points especially to *Section 153 (i)* which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements 'shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designated to handle such disputes. Failing to reach an adjustment in this manner, the dispute may be referred by the petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute.' " (312 U. S., l. c. 634.)

"For neither the original 1926 Act nor the Act as amended in 1934 indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. * * * The District Court and the Circuit Court of Appeals properly decided that Petitioner was not required by the Railway Act to seek adjustment of his controversy with the Railroad as a prerequisite to suit for wrongful discharge." (312 U. S., l. c. 635.)

It is significant that the very section of the Act, Section 3 (Sec. 153 U. S. C. A.), First (i), which the Court of Appeals in this case has held precludes proceeding in equity on the ground that proceeding under such section is an adequate remedy, was expressly before the court in the Moore case and said section in that case was held not to modify the jurisdiction of the courts.

State courts have ruled accordingly. In *Delaware Railroad Company* v. *Slocum,* 50 N. Y. Sup. (2d) 313, the Railway brought a suit for a declaratory judgment as to the respective rights and obligations of the Order of Railroad Telegraphers and Brotherhood of Railway Clerks under their respective contracts with the Company. It was contended that the procedure under the Railway Labor Act was adequate and exclusive and that the court was without jurisdiction to decide the rights of the parties until after the remedies under the Act were exhausted. The court said:

> "The present action involves neither the validity, construction, enforcement, nor effect of the Railway Labor Act, nor any federal statute. On the contrary, it is brought solely to obtain a declaratory judgment determining the rights and obligations of the parties under written agreement. The Plaintiff is seeking no rights under the Railway Labor Act. It seeks relief only under the contracts. State courts have taken jurisdiction of controversy involving working agreements, not only before the adoption of the Railway Labor Act, but since. Among numerous such cases are *Florestone* v. *Northern Pacific Railroad,* 198 Minn. 203, 269 N. W. 407, and *Franklin* v. *Pennsylvania Lines,* 122 N. J. Equity 205, 193, Atlantic 7, 112. The procedure under the Railway Labor Act seems inadequate to bind the three parties to this action.
>
> "proceeding before the Adjustment Board or otherwise under the Railway Labor Act has been had. Such proceeding is not a prerequisite to action in court. (*Moore* v. *Illinois Central Railroad,* 312 U. S. 630, 635, 636, 61 S. Ct. 754)." *Delaware Ry. Co.* v. *Slocum,* 50 N. Y. Sup. (2d) l. c. 315-16.

In *Gaskill* v. *Roth,* 8 C. C. A., 151 Fed. (2d) 366, forty-one conductors brought a suit for a declaratory judgment

against the Railroad and against the Order of Railroad Conductors to determine the rights of the parties under their respective contracts with the railroads. The lower court decided the case against the plaintiffs on the merits and after full hearing, which judgment was affirmed by the Court of Appeals. No proceeding was had before any Railroad Board nor did the court hold or intimate that any such proceeding was essential before a court could decide the merits.

Washington Terminal Company v. *Boswell* (U. S. Ct. Apps. D. C.), 124 Fed. (2d) 235, l. c. 249, clearly and unmistakably holds that the jurisdiction of the court is not ousted or truncated by the Railway Labor Act. That case was a suit for a declaratory judgment fixing the rights of employees of railroad companies under collective bargaining agreements. Then Judge Rutledge, in reviewing Moore against Central Railroad, stated as follows:

> "The decision in *Moore* v. *Illinois Central Railroad Company,* 312 U. S. 630, 61 S. Ct. 754, rendered since this case was argued, has put beside the point much of the argument here. The case held that the Railway Labor Act does not preclude an employee from bringing a suit for damages for alleged wrongful discharge contrary to a collective agreement. The plaintiff employee, however, had begun his suit before the administrative machinery had been in motion. The decision establishes that in such circumstances the Act has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise for a decision of controversy which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternative routes which they may follow. One is entirely judicial without regard to the Railway Labor Act. The other is administrative and judicial according to its terms." (l. c. 238.)

Judge Rutledge further declared:

> "The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore* v. *Illinois Central Railroad, Supra,* can bring its suit on the contract independently of the statute prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act." (l. c. 249.)

See also *Nord* v. *Griffin,* 86 F. (2d) 481 (7 C.C.A.).

Southern Railway Co. v. *Order of Railway Conductors* (Dist. Ct. So. Carolina), 63 Fed Sup. 306, was an action for declaratory judgment construing a contract between the railway company and the union of railway conductors. It was not contended that the court was without jurisdiction because of the administrative remedy afforded by Section 3, First (i). The court held that the employment contract could be construed and adjusted either under authority of the Railway Labor Act or by carrying it to the Adjustment Board or by exercising common law rights to bring an action to construe contracts and protect rights.

> "From the foregoing language it appears that Congress intended that disputes of the character covered by the pending cause may be adjusted in either of two cases: First, under the authority of the Act by carrying it before the Adjustment Board or Second, by exercising the common law rights of any parties to bring an action to construe a contract to protect his rights. And so it is quite clear that there is concurrent jurisdiction of the subject made of this suit either by the Adjustment Board or a court of competent jurisdiction. The parties by agreement may use either method or adjudication, or

> either party may institute an action in a court or before the Board. I am of the opinion that if the matter is taken first before a court it will retain jurisdiction and carry the case through to an adjudication. If, however, the Board has taken jurisdiction the court will not intervene. These views seem amply sustained by numerous decisions of our courts." l. c. 308.

The court cites and quotes from *Moore* v. *Illinois Central Railroad,* 312 U. S. 630, 61 S. Ct. 754; *Washington Terminal Company* v. *Boswell,* 124 Fed. (2d) 235; *Delaware Corporation* v. *Williams,* 7 C. C. A., 129 Fed. (2d) 11. The court then continues:

> "There are numerous other cases, including cases in the State Courts sustaining these views, but I think that the foregoing are sufficient to amply sustain the views announced as to the construction of the Act in question."

Evans v. *Louisville Railway Co.* (Supreme Court of Georgia), 12 S. E. (2d) 611, was a suit by a group of employees for an injunction against violation by the company of a contract between the railway and the employees. It was contended that the court was without jurisdiction because the Railway Labor Act had afforded an adequate remedy and particularly under Section 3 First (i). The court ruled:

> "Rights of seniority, given under collective bargaining are such property rights as are not proper case but protected by injunction relief in a court of equity." 12 S. E. (2d), l. c. 615, citing cases.

The court further said:

> "It is contended under this provision (Sec. 3, First (i)) that the National Railroad Adjustment

Board is vested with exclusive jurisdiction over disputes between employees and the Carriers as to seniority rights or at least that the complaining employee or employees must, before resorting to the courts, first exhaust the remedy afforded by this provision. This contention is untenable. The present action is one to enforce certain alleged rights under a contract and does not involve or arise out of any order of the National Railroad Adjustment Board and the above provision does not purport in such case to prevent recourse to the courts in the first instance." 1. c. 614, citing the Moore case and others.

Appendices A and B.

There are printed as appendix two opinions by a three-judge court (District Court, Northern District Court). These opinions are illuminating and stress the necessity that this Court clear confusion upon this most important Act.

VII.

The Case of *Order of Railway Conducters of America* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, is not in conflict but is in support of the judgment of the District Court.

The opinion of the Court of Appeals is based upon its construction of the Pitney case. That case is clearly distinguishable from the case at bar. There were vital facts and circumstances in the Pitney case, entirely absent in this case, which were controlling. There were three parties, Order of Railway Conductors, Brotherhood of Railroad Trainmen and the Railway. Each union had a contract with the railroad, under which each claimed the right to perform given service. *There was dispute and controversy based on conflicting evidence between the railroad and*

each union. The dispute was not confined to one between unions. The dispute upon conflicting evidence was between each union and the railroad. The plaintiff, being the conductors, had the right to go against the Carrier before the Railroad Adjustment Board under Section 3, First (i) of the Act, presenting a dispute *between themselves as employees, and the carrier as employer,* growing out of the interpretation or application of the agreement between the parties. The trainmen, being employees, had the right to go before the Adjustment Board against the carrier, being their employer, presenting a dispute as to the interpretation or application of the Trainmen's contract with the Carrier. Moreover, both the Conductors and the Trainmen would go before the same Division of the Board, being Division 1 (Section 3, First (h)).

Such issues were intricate and technical.

> "The factual question is intricate and technical." l. c. 567.

> "The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position." l. c. 566.

The court held that the Adjustment Board was an agency peculiarly competent and specifically designated to deal with such intricate and technical factual questions. Also the Court of Equity was not so constituted as to deal with such intricate and technical questions pertaining to the operations of railroads.

> "Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute." l. c. 567.

Both because the Court of Equity was not so constituted as to pass upon the intricate and technical questions involved in that case; and also because the Railroad Adjustment Board was constituted and was experienced as to be better able to pass thereon; and because Division 1 of the Adjustment Board had jurisdiction to pass upon the questions presented in each case; because in the case of each union there was a dispute and controversy between it and the Carrier—the court withheld its equitable process until such proceedings were had.

The Pitney case and this case are in striking contrast. In this case there is no dispute or controversy between the Carriers and the Porters, calling for the construction and application of the contract between them. There is no dispute between the Carriers and the Porters as to the existence, meaning, effect and application of the contract between them. Both parties agree that for more than forty years, under contract, and custom and practice, made a part of the contract, the Porters have performed the duties in question. Both the Carriers and the Porters are satisfied with the contract and custom, and desire it to continue indefinitely in the future as it has undoubtedly endured through the years. The Adjustment Board has no authority to change lawful contracts between employer and employees with which the parties are satisfied.

Moreover, if the Porters had such remedy, they would have to go before Division 4 of the Adjustment Board, while the Trainmen would have to go before Division 1 and could not go before Division 4. (Section 3, First (h)). There is no way by which the Trainmen and the Porters could go, even separately, before the same Division. The confusion and uncertainity and even absurdity of two proceedings before different divisions of the Board, neither one having any authority to make a decision binding in or

otherwise affecting the other proceeding, would alone and without more, make the administrative remedy wholly inadequate.

The reason for the court's decision in the Pitney case, requiring the Court of Equity to stay its hand until proceedings were had under the Act, was that the Court of Equity was not so constituted or experienced as to enable it to deal with questions intricate and technical and requiring expert knowledge and experience, whereas the Board was so constituted. The opinion emphasizes that the decision in that case involved more than the mere interpretation of contracts or the construction to be placed thereon (l. c. 567). That reason is entirely absent in this case. There is no intricate, difficult or technical question involved in this case. The proof is clear, unmistakable and without conflict as to the existence and meaning of the Porter's contract, which has existed in its present form for forty years. There is no evidence whatever that by contract, oral or written, or by custom or practice, the Trainmen have had the exclusive right to such services at any time. The findings of fact, being supported by all the evidence, are conclusive on that question. The Court of Equity is not only qualified and constituted to enable it to pass upon such simple issue of fact, but is better qualified as a court than is the Adjustment Board as to all questions of law.

In this case, what are the questions of fact? *First*, was there a contract between the Porters and the Carriers permitting performance of the work in question by the Porters? *Second*, was there any dispute between the Carriers and the Porters as to the meaning, scope and effect of that contract? *Third*, were the parties content with the contract and desirous of its continuation unmodified? *Fourth*, did the Trainmen have an overlapping

contract which entitled them exclusively to the work in question? *Fifth*, was it, or had it been, the practice on the system for the Trainmen exclusively to perform such services?

Manifestly, it cannot be said with any color of reasoning that these issues of fact were intricate and technical, and that a Court of Equity was not so constituted as to enable it fairly to pass on such issues. Nor can it be said that the Adjustment Board, by reason of the intricate and technical questions of fact, was by constitution and experience better able to pass on such issues.

VIII.

The Porters have no adequate remedy before the mediation board (Title 45, Section 154, U. S. C. A.).

As heretofore submitted, the Porters may not go before the Adjustment Board against the Carriers to settle a dispute between them growing out of the interpretation or application of the contract between the Porters and the Carriers. Nor may the Porters go against the Trainmen before the Board for the manifest reason that the Board has jurisdiction *only* in disputes between employees and employers—it has *no* jurisdiction in disputes between one group of employees and another group of employees. (*Estes* v. *Union Terminal Co.*, 89 Fed. (2d) 768, 5 C.C.A., l. c. 770, 773; *Steele* v. *Louisville Co.*, 323, U. S. 192, 65 Sup. Ct. 226, l. c. 233; *Tonstall* v. *Brotherhood of Locomotive Firemen*, 223 U. S. 214, 65 Sup. Ct. 235, l. c. 237.) In the only dispute of which either Board has jurisdiction, i. e., a dispute between employer and employee, no other group of employees may be made parties, nor can such group intervene or otherwise be heard. (Same cases as last above cited.)

Likewise and for the same reasons, the Porters can have no proceeding before the Mediation Board for relief of the wrongs being committed against them by the Trainmen.

There is no question whatsoever here as to certification of accredited representatives nor any question of classification of employees for the purpose of collective bargaining under the provisions of Section 4 of the Act. There is no dispute between the Porters and the Carriers as to the interpretation or application of the contract between them. The Mediation Board is powerless, at least against the objection of the Trainmen, to issue any process or make any orders or adjudication to prevent the wrong being committed against the Porters by the Trainmen, i. e., coercion of the Carriers by unlawful means into cancelling the Porters' contract and taking the jobs from the Porters and giving them to the Trainmen.

Nor have the Porters any remedy whatsoever before the Mediation Board in resistance to the notice by the Carriers to the Porters that the contract would be terminated because of the pressure on the Carriers by the Trainmen. *It must be borne in mind* that the wrong here being committed is by the Trainmen against the Porters. *The contract is at will.* The Mediation Board cannot make contracts for the parties nor modify the terms thereof. It cannot order a contract terminable at will to be one of fixed duration. *The right* of the Porters against the Carriers is that the Carriers shall be free to exercise the judgment of the Carriers as to termination of the contract without legal interference or compulsion by the Trainmen.

> "*Contracts Terminable at Will.* The fact that the contract is 'at will' and terminable by either party at any time is of no consequence, where neither party has attempted to revoke the contract and was not

obliged to do so, since each party to the contract has a manifest interest in the freedom of the other to exercise his judgment without illegal interference or compulsion." 32 C. J. 228.

The right of the Porters against the Trainmen is to have the Trainmen restrained from coercion of the Carriers into abrogation of the contract and the taking of the Porters' jobs for the Trainmen.

No tribunal except a court of equity can meet that situation. Not only is the Mediation Board without any jurisdiction in the premises, but it has no process by which it could enforce its order. It cannot enjoin, as the equity court can, the unlawful and harmful coercion of the Carriers and prevent continuation of the very heart of the wrong that is here being perpetrated. If the Trainmen are stopped in their unlawful course, the Carriers (as shown not only by evidence but by their answer) will no longer seek to abrogate the contract nor take the jobs from the Porters and give them to the Trainmen, but will continue the existing status. Nothing short of that can do justice.

VIII.

Plaintiffs' petition states, and the proof shows, a cause of action at common law that is not dependent upon nor limited by The Railway Labor Act.

One who wrongfully causes a person to breach his contract with another is liable to the latter for damages resulting from such breach, and where irreparable injury occurs may be enjoined from such conduct.

IX.

Inducing Breach of Contract.

"One who maliciously or without justifiable cause induces a person to break his contract with another will be liable to the latter for damages resulting from such breach; and it is no defense that the contract is unenforceable because within the statute of frauds; nor that defendant misinterpreted the meaning of the contract, but where a partnership agreement was for no definite term, a third person was held not liable to one partner for inducing the other partner to terminate the partnership. Malice is proved if it appears that the defendant with knowledge of the contract, intentionally and without justification induced one of the contracting parties to break it." 2 Cooley on Torts, Sec. 227, 4th Ed.

In support of such text Judge Cooley cites the following cases:

"*United Mine Workers of America Dist. No. 17* v. *Chafin,* 286 Fed. 959; *Canellos* v. *Zotalis,* 145 Minn. 292, 177 N. W. 133; *Bacon* v. *St. Paul U. Stockyards Co.,* 161 Minn. 522, 201 N. W. 326; *Wheeler-Stenzel Co.* v. *American Window Glass Co.,* 202 Mass. 471, 89 N. E. 28, L. R. A. 1915F 1076; *Twitchell* v. *Nelson,* 126 Minn. 423, 148 N. W. 451, 601; *Schonwald* v. *Ragains,* 32 Okla. 22, 122 Pac. 203, 39 L. R. A. (N. S.) 854; *Tubular Rivet & Stud Co.* v. *Exeter Boot and Shoe Co.,* 159 Fed. 824; *Dale* v. *Hall,* 64 Ark. 221, 41 S. W. 761; *Employing Printers' Club* v. *Doctor Blosser Co.,* 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 694; *Morehouse* v. *Terrill,* 111 Ill. App. 460; *Gore* v. *Condon,* 87 Md. 368, 39 Atl. 1042, 40 L. R. A. 382, 67 A. St. Rep. 352; *Morgan* v. *Andrews,* 107 Mich. 33, 64 N. W. 669; *Van Horn* v. *Van Horn,* 56 N. J. L. 318, 28 Atl. 669; *Raymond* v. *Yarrington,* 96 Tex. 443, 72 S. W. 580, 62 L. R. A. 962, 97 A. M. St. Rep. 914; *Brown Hardware Co.* v. *Indi-*

ana Stove Works, 96 Tex. 453, 73 S. W. 800, 62 L. R. A. 962; *West Virginia Transp. Co.* v. *Standard Oil Co.,* 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; *Martens* v. *Reilly,* 109 Wis. 464, 84 N. W. 840; *Angle* v. *Chicago, St. P., M. & O. Ry. Co.,* 151 U. S. 1, 38 L. Ed. 55, 14 Sup. Ct. 240, rev'g 39 Fed. 912; *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1903), 2 K. B. 454; *Giblan* v. *National Amalgamated Laborers' Union* (1903), 2 K. B. 600; *Quinn* v. *Leathem* (1901), A. C. 495." 2 Cooley on Torts, Sec. 227, 4th Ed.

Injunction will lie in such case.

"*Inducing Breach of Contract*—a. Unlawfulness of Act. A contract right, it has been said, is property which is to be protected against undue influence by persons not parties thereto, since such action on their part is a direct invasion of that right. A person or combination of persons who maliciously, without just cause or excuse, persuades a party to a contract of any character to break it, to the injury of the other party, is guilty of an actionable tort.

Relief by Injunction—(1) General Principles. While the mere interference with a lawful contract by a stranger thereto does not of itself give the injured person a remedy by injunction, which will be denied when full indemnity may be had at law, it is very generally held that an injunction will lie to restrain third persons singly or in combination from inducing the breach of a lawful contract by one of the parties thereto when it will result in irreparable injury to the other, irrespective of the fact that defendant is solvent. Nor is it essential that the contract should be of such a nature that specific performance could be decreed.

Contract terminable at will. The fact that the contract is 'at will' and terminable by either party at any time is of no consequence, where neither party

had attempted to revoke the contract and was not obliged to do so, since each party to the contract has a manifest interest in the freedom of the other to exercise his judgment without illegal interference or compulsion." 32 C. J. 228.

"From early time the common law recognized a right of action in the master for loss of services occasioned by injury to his servant, and in 1349, after the great plague had caused a scarcity of laborers, the Ordinance of Labourers gave an action for enticing away one who by the statute was required to work for another. Thus the law stood until the middle of the nineteenth century. Then it was declared in *Lumley* v. *Gye* that it was actionable to maliciously procure one to break a contract for personal services, though the one who broke the contract was not a servant. There was doubt for some time as to whether this doctrine applied to other than service contracts, but it is now clear that it applies also to commercial contracts generally, though not to contracts to marry.

In *Lumley* v. *Gye,* 2 El. and Bl 216, the right of action was said to exist against one who 'maliciously procures' the breach of contract, and the terms seemed to be used to describe a vindictive spirit. However, the House of Lords has said that 'it is settled now that malice in the sense of spite or ill will is not the gist of such an action as that which the plaintiffs have instituted,' but 'that the violation of a legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." Burdick's Law of Torts (Fourth Edition), p. 472-3.

"19 General Rule in United States.—The weight of authority supports the rule that an action will lie against a person who, otherwise than in the legitimate exercise of his own rights, procures a breach of any

contract, even though it is not a contract of employment. The theory of this doctrine is that the right to perform a contract and to reap the profits resulting from such performance, and also the right to performance by the other party, are property rights which entitle each party to protection, and to seek compensation by action in tort for any injuries to such contract." 30 Am. Jur. p. 71-72.

Williams v *Sinclair Co.*, 74 Fed. Sup. 139, contains a summary of leading cases.

We know of no authority to the contrary.

X.

The demands, threats and conduct of and by the Trainmen constitute unlawful duress and oppression, particularly that kind of duress called business compulsion. Such conduct is a common law tort.

The modern doctrine of duress because of business compulsion has been exhaustively briefed and discussed in a notation in 79 A. L. R., page 655. A paragraph appears at page 657, as follows:

> "III. Modern doctrine of business compulsion. It seems to be established as a general rule, at least in this country, that the payment of money or the making of a contract may be under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover the money paid, or excuse him from performing the contract. This doctrine is supported by many decisions, particularly the more recent ones, among which may be cited the following: * * *."

Following this quotation, the author has listed more than fifty cases from twenty-four different states, the United States and England.

The foregoing doctrine finds full support in the following cases:

Lonergan v. *Buford,* 146 U. S. 581, 13 Sup. Ct. 684; *Snyder* v. *Rosenbaum,* 215 U. S. 261, 30 Sup. Ct. 73; *Union Pacific Railroad Company* v. *Public Service Commission,* 248 U. S. 67, 58 S. Ct. 24; *Furman* v. *Gulf Insurance Company,* 152 Fed. (2d) 891, 8 C. C. A.; *Radeck* v. *Hutchins,* 95 U. S. 210, 213; *Ingram* v. *Lewis,* 37 Fed. (2d) 259, l. c. 264. We quote from the Furman case, 152 Fed. (2d) 891:

> "In general terms, duress is the domination of another's will to his detriment by means or under circumstances that make the particular transaction wrongful against him. *Cf. Wood* v. *Kansas City Home Telephone Co.,* 223 Mo. 537, 558, 559, 123 S. W. 6, 12; *Winget* v. *Rockwood,* 8 Circ., 69 F. (2d) 326, 329, 330; Restatement, Torts, Sec. 871, Comment f. Some states, including Missouri, have recognized the broad doctrine of 'business compulsion' in the field of duress. See 17 Am. Jur., Duress and Undue Influence, Sec. 7; Annotation, 79 A. L. R. 655; *White* v. *McCoy Land Co.,* 229 Mo. App. 1019, 1040, 87 S. W. (2d) 672, 685, affirmed sub. nom. *White* v. *Scarritt,* 341 Mo. 1004, 111 S. W. (2d), 18. In the still fluid state of that doctrine, we shall not attempt any crystallizing formulation of it here, since it is not necessary to do so for present purposes.
>
> Whether the free will of a party has been so dominated in a particular transaction as to have controlled his action is ordinarily a question of fact, where it is possible under the evidence for there to have been a wrongful use of coercive means or circumstances. *Cf.. White* v. *McCoy Land Co.,* 229 Mo. App. 1019, 1039, 1040, 87 S. W. (2d) 672, 684; *Winget* v. *Rockwood,* 8 Cir., 69 F. (2d) 326, 330." *Furman* v. *Gulf Insurance Company,* 152 Fed. (2d) 891, 8 C. C. A.

See also 17 Amer. Jur., p. 879.

It is true that mere threat to resort to civil process is not duress. But a threat to resort to oppressive process, proceedings unlimited in number, and for huge amounts where the intention is not to enforce an honest right but maliciously to overcome the will of the person threatened so that he will pay or render in total disregard of any merit in the claims, may be duress and is undoubtedly business compulsion.

The threat here was not litigation to settle rights but it was a threat to file thousands of cases, endless litigation. It was not a threat for some over-all litigation that would settle the issues but a separate claim for a full day's pay for a Trainman every time a Porter threw a switch. These threats coupled with a ten day ultimatum were made by a powerful economic organization with a hint of a strike hanging in the air.

The record presents a perfect case of business compulsion amounting to duress. When such duress and business compulsion was perpetrated by the Trainmen against the Carriers to induce the latter to breach their contract with the Porters, such conduct constituted a common law tort committed by the Trainmen against the Porters.

Respectfully submitted,

CLIF LANRSDALE,
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Attorneys for Petitioners.

Appendix A.

(This is an unpublished opinion by a three-judge court of the Northern District of Illinois.)

In the United States District Court
for the Northern District of Illinois,
Eastern Division.

Obie Faust Hunter, *et al.*, Plaintiffs,

vs. No. 44 C 971

The Atchison, Topeka and Santa Fe Railway Company, *et al.*, Defendants,

Memorandum.

Plaintiffs, who describe themselves as members of a class and craft of railroad employees, entirely composed of colored persons and known as Train Porter Brakemen or Train Porters and Chair Car Attendants or Parlor Car Attendants, have brought this action against the Atchison, Topeka, Santa Fe Railway Company, the National Railroad Adjustment Board, First Division, and the Secretary and members thereof, the vice-president of the Brotherhood of Railroad Trainmen, a voluntary unincorporated association comprising all the persons who would be adversely affected if the relief prayed in the complaint were granted, and certain other persons as representatives of that class, praying that a certain order of the National Adjustment Board be set aside, that defendants be enjoined from attempting to enforce said order and for other relief and raising the question of the constitutionality of the Act, or parts of the Act, creating the Board.

Plaintiffs allege that prior to 1899 the defendant railroad company created a class of employees composed ex-

clusively of colored persons known as train porters, train porter brakemen or chair or parlor car attendants, their duties being to keep their cars clean, care for passengers and, at the head end of the train, to inspect cars and test signals and brake apparatus for the safety of train movement, to open and close switches, couple and uncouple cars and engines and hose and chain attachments thereof; that the members of such class performed all of such duties until the entry by the Board of the order complained of. Plaintiffs are members of this class, which is not organized and has no union to represent its members.

During all of the time mentioned, plaintiff alleges, there has been another class of persons, exclusively white, known as brakemen, who worked on freight trains and also performed the same service on the rear end of passenger trains, as the porters or porter brakemen on the front end. All of these persons belong to the organization known as the Brotherhood of Railroad Trainmen.

It is further alleged that on May 3, 1939, the Brotherhood of Railroad Trainmen, without notice to any member of the class to which plaintiffs belong, filed with the National Railroad Adjustment Board, First Division, at Chicago, Illinois, a protest against the railroad agency charging non-compliance with certain rules and the provisions of a contract between the railroad and the Brotherhood, the substance of the protest being (as we gather from the complaint though the allegations on this subject are rather confused) that the members of plaintiff's class were being given work that should go to the white men members of the Brotherhood. A hearing was had at which the railroad company and the Brotherhood, but not the Porters, were heard, and the majority of the Board, the employee representatives and the Referee, held the complaint well found and that the use of Porters for the work above

mentioned was a violation of the rights of the members of the Brotherhood. The five employer members dissented, calling attention to the fact that train porters had been employed by the railroads since March, 1899, and since that time had performed the duties complained of; that on two prior occasions a similar dispute between the same groups had been submitted to the Train Service Adjustment Board created by the Act of 1926, in the first of which submissions the parties had agreed that the decision should be final and binding upon them and in each instance the Board rejected the contention of the Brotherhood.

Plaintiffs pray that the order of the Board may be set aside for the reason, among others, that it is not authorized by the terms of the Act creating the Board and they also attack the constitutionality of the Act. It is with this latter question only that we have to deal.

If the Board established by the Railway Labor Act were the only tribunal to which disputes between a railroad and its employees could be submitted there might be some force to the contention that the Act in its operation violates the Constitution. The dispute here is between white and colored employees as groups and the Board, the labor members of which are representatives of unions which exclude colored persons, is, perhaps a biased tribunal in such a case as this.[1]

But plaintiffs are not limited to proceedings before the Board for the protection of their rights. Congress created the Board for the purpose of providing means for the prompt settlement of labor disputes between railroads and their employees and to avoid interruptions of commerce by strikes or lockouts. As the most serious disturbances

[1] They also complain that the term "national in scope" used in the Act in describing the union entitled to representation on the Board is vague and uncertain, but we do not think it necessary to pass on this question.

arise from disputes between employees organized into unions and the railroads, it provided for a Board composed of representatives of unions and representatives of the railroads, gave it jurisdiction of disputes submitted to it and provided certain means of enforcement of its orders.

But it did not take away the right of an employee to appeal to the courts for relief. If a railroad, in violation of the rights of an employee, discharges him or attempts to deprive him of seniority rights the civil courts afford him a remedy. *Nord* v. *Griffin*, 86 F. (2d) 481, cert. denied, 300 U. S. 673; *Moore* v. *Illinois Central R. R. Co.*, 312 U. S. 630. In this latter case Mr. Justice Black speaking for the court said:

> "For neither the original 1926 Act nor the Act as amended in 1934, indicated that the machinery provided for settling disputes was based upon a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation *voluntary in its nature*. The District Court and Circuit Court properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to a suit for wrongful discharges." (Emphasis ours).

In their complaint plaintiffs allege that by contract or custom they had acquired certain seniority rights as brakemen and that the railroad because of pressure by a union composed solely of white men deprived them of work they had been doing and reduced their seniority. If their legal rights were violated they could have restrained the railroad from continuing the wrong as was

done in *Nord* v. *Griffin, supra.* Or they might have their action for damages.

The Act does not deprive plaintiffs of liberty or property and does not violate the Fifth Amendment to the Constitution.

JUDGE WILLIAM M. SPARKS
JUDGE WILLIAM H. HOLLY,
JUDGE WALTER J. LA BUY,

Dated: October 17, 1946.

Appendix B.

In the District Court of the United States
for the Northern District of Illinois
Eastern Division

Obie Fauster Hunter, *et al.*, Plaintiffs,
vs.
The Atchison, Topeka and Santa Fe Railway Company, a corporation, Eastern and Western Lines, *et al.*, Defendants.

Civil Action
No. 44 C 971

Findings of Fact, Conclusions of Law and Order for Temporary Injunction.

This cause came on to be heard on the 26th day of January, 1948, and from day to day thereafter and now coming on for final disposition upon the application of the plaintiffs for a temporary injunction, before the Honorable Walter J. La Buy, Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division, and upon all pleadings and oral and documentary evidence introduced by the parties in open

court and upon consideration thereof and of the arguments of counsel for the respective parties, the court now finds the following:

I.

Findings of Fact.

1. The court finds that the plaintiffs are members of a class or craft of railroad employees entirely composed of colored persons and known as porter brakemen or train porters and hereinafter called porter brakemen and chair car attendants, and reside in various states of the United States of America; and the porter brakemen have been employed by the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, Eastern and Western Lines, hereinafter called the Carrier Defendant, in the operation of its business as an Interstate Carrier, since to-wit: 1899 as such class or craft; that the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, is a corporation organized under the laws of the State of Kansas, and is licensed to do business in the State of Illinois; said corporation has its principal office or place of business in the City of Chicago, County of Cook and Sate of Illinois, in (page 2 begins) said Northern District of Illinois, Eastern Division, and is within the jurisdiction of this court; and is a carrier engaged in Interstate Commerce by railroad within the meaning of the Acts of Congress relating thereto. The defendant, The National Railroad Adjustment Board, First Division, is a board established by and pursuant to the authority of the Railway Labor Act as amended, maintaining headquarters in Chicago, Cook County, Illinois, within said District, in accordance with the provisions of the said Act of Congress and maintains its principal office within said District. The defendants, G.

W. Laughlin, William Bishop, H. J. Hoglund, George H. Dugan, T. L. Green, Nathan L. Hale, B. C. Johnson, Sidney R. Prince, Jr., O. E. Swan, and R. J. Tillery are members of said National Railroad Adjustment Board, First Division, and are within said District. James B. Riley, who acted as Referee and a member of The National Railroad Adjustment Board, First Division, for Order and Award No. 6640, Docket No. 7400, is a non-resident of the State of Illinois and is not within the jurisdiction of this Honorable Court. The defendant, T. S. McFarland, is Secretary of said National Railroad Adjustment Board, First Division, and is within said District. The defendant, F. W. Coyle, is within said District and is Vice President of the Brotherhood of Railroad Trainmen, a voluntary, unincorporated association comprising a majority of the persons who would be adversely affected if the relief prayed in the complaint were granted. The defendants, C. D. Shepherd, J. W. McDonald, E. F. Allen, M. L. Pennebaker, J. J. Kain and C. E. Martz, who are employed as brakemen by the Carrier Defendant, are members of the Brotherhood of Railroad Trainmen and representatives of that class of persons and employees who would be adversely affected if the relief prayed in the complaint were granted and are within said District.

2. The matter in controversy herein involved exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and the suit and controversy arises under the Constitution and laws of the United States.

3. On to-wit: March 1, 1899, the Carrier Defendant created a class or craft of employees known as train porters or porter brakemen and (p. 3 begins) prescribed their duties as follows: To inspect cars, test signals and brake apparatus for the safety of train movement, use hand

and lamp signals for the protection and movement of trains, open and close switches, couple and uncouple cars and engines and the hose and chain attachments thereof, compare watches when required by the rules of the company, care for passengers who were received and discharged from the head end of the trains, report to and receive instructions from the train masters and while on duty, to be under the direction of the train conductor, to perform the duties of a brakeman, carry the proper equipment to keep the coaches and chair cars under their care neat and clean. This contract of employment with the Carrier Defendant was to continue at the will of the said Carrier Defendant. The Carrier Defendant did not will to terminate said contract or employment until the brakemen defendants through the Brotherhood of Railroad Trainmen as their representative continued to insist that it comply with Award No. 6640 without further delay.

4. Certain rosters setting forth the seniority dates of only the plaintiff porter brakemen were from time to time established by the said Carrier Defendant and were made public and posted at various places on the property of said Carrier Defendant, showing the employees entitled to preference of runs and assignment of work according to their seniority rights. Nothing except as stated in paragraph 3 herein, has intervened to impair or abrogate the seniority rights of the plaintiffs as porter brakemen and that said seniority rights are property within the meaning of the 5th Amendment of the Constitution of the United States.

5. At the time the plaintiffs were employed as a class or craft by the Carrier Defendant, there was then existing and has continued to exist a separate class or craft of employees exclusively white, known as brakemen who were employed by the Carrier Defendant to perform and did

perform some of the services on the rear end of passenger trains which the porter brakemen performed on the front end of said passenger trains. These brakemen belonged to the class or craft represented on the Carrier Defendant by the Brotherhood of Railroad Trainmen. Separate seniority rosters were kept for these brakemen and there was no interchange of (p. 4 begins) seniority between them and the porter brakemen.

6. At the time of the entry of the said Order and Award No. 6640 and for many years prior thereto, the plaintiff porter brakemen were receiving an average monthly wage of $250.00 each for the services which they were rendering to the Carrier Defendant.

7. On May 3, 1939, there was filed with the defendant, The National Railroad Adjustment Board, First Division, Chicago, Illinois, hereinafter called the Board, and the individual members thereof, without notice to the plaintiffs or any member of their class or craft, a protest against the Carrier Defendant, charging non-compliance on its part with the provisions of a contract between the Carrier Defendant and the Brotherhood, the substance of the protest being that certain work performed by employees not holding seniority as brakemen was work which should go to persons holding seniority as brakemen on the Carrier Defendant, and claimed reimbursement at the passenger rate for time lost by certain brakemen in the Plains Division; thereafter, certain proceedings were had by the said defendant, The Board, with reference thereto; No notice of the said proceeding was given to the plaintiffs or to any member of the class or craft to which the plaintiffs belonged, and the said proceedings and all of them were conducted and carried on in the absence of the plaintiffs and the members of the class or craft to which they belonged; the only parties to the proceedings

before the said Board were The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines, and the Brotherhood of Railroad Trainmen of which voluntary, unincorporated association, the white brakemen who are named as defendants in this suit are members, but of which association the plaintiffs nor any member of their class or craft are not and have never been members; after the hearing on said protest and as a result thereof, the majority of the said Board, the employee representatives and the Referee, on April 20, 1942, found that the said "use of porters or other employees, who do not hold seniority as brakemen is in violation of claimants' seniority rights". After the hearing in said proceedings before the Board and as a result thereof, the said Board did on April 20, 1942, issue its Award No. 6640, Docket No. 7400; said Award was issued by the said Board acting by and through the defendant, T. S. McFarland (p. 5 begins) as Secretary thereof. On May 14, 1942, the Carrier Defendant filed a petition for rehearing with the said Board praying that the said Award No. 6640 be set aside; the said Board refused to grant or deny said petition for rehearing. On May 3, 1944, Carrier Defendant withdrew said petition for rehearing. Such withdrawal was at the insistence of the Brotherhood of Railroad Trainmen acting for the brakemen defendants who demanded that the Carrier Defendant without further delay comply with the Order and Award No. 6640 by removing, reducing, and furloughing the plaintiffs and all members of their class or craft; whereupon the said Carrier Defendant notified the plaintiffs and all members of the class or craft that the Award No. 6640 and Order would be immediately enforced against them. Some of the said plaintiffs and members of the class or craft to which they belonged were removed from their regular

runs, replaced by members of the class or craft to which the brakemen attendants belonged solely as a result of Award No. 6640, and their wages were reduced. All of the plaintiffs and members of the class or craft were to be removed, reduced or furloughed solely by virtue of the Order and Award No. 6640. Since the filing of this suit and the appearance of the defendants hereinabove mentioned, further enforcement of the above mentioned Order and Award No. 6640 against the said plaintiffs was threatened by written notice to the plaintiffs from the Carrier Defendant, that on November 1, 1944, the said plaintiffs would be removed from their positions as porter brakemen on trains No. 1, 2, 3, 2nd. 3, 2nd. 4, extra section 4, 5, 6, 9, 10, 15, 16, 1st. and 2nd. 23, 1st, and 2nd. 24, 27, 28, 47, 50 and other trains of the said defendant, The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines which positions they then held and have held and occupied prior to the entry of the aforesaid Order and Award; the positions now held by the said plaintiffs are to be filled by members of the class or craft to which the brakemen defendants belong and who have not heretofore held said positions, such changes which are to be so made are solely by reason of the Order and Award No. 6640 aforesaid and the enforcement thereof.

8. The individual brakemen defendants named herein, through the Brotherhood of Railroad Trainmen, are continuing and threaten to con- (p. 6 begins) tinue to insist upon the Carrier Defendant that it comply with the terms of the Order and Award No. 6640 and Carrier Defendant will comply with Award No. 6640 unless enjoined by order of this court, which compliance will result in immediate, great and irreparable injury, loss and damage being caused plaintiffs before the hearing and determination of this cause can be had, unless the defendants and each

of them are, pending such hearing and determination, enjoined by order of this court; the enforcement of the said Order and Award will deny the plaintiff porter brakemen their property rights to continue to work at the will of the Carrier Defendant and perform the services which they have been performing since 1899, and plaintiffs will suffer loss of their seniority rights and will also lose certain rights which they have earned to benefits under the Railroad Retirement Act.

II.

Conclusions of Law.

From the foregoing facts the court concludes:

1. That this court has jurisdiction of the parties and the subject matter, and venue is properly in this court.

2. The complaint states a cause of action, cognizable by this court.

3. On the basis of *Nord* v. *Griffin*, 86 Fed. (2d) 481, which is the settled law of this jurisdiction, Award No. 6640 of the National Railroad Adjustment Board, First Division, is void because it was rendered without notice to plaintiffs who were involved in the subject matter thereof, within the meaning of the Railway Labor Act, Sec. 3 (j) and because the proceeding conducted by the said Board preliminary to issuing the Award were outside the presence of the plaintiffs, who were not given an opportunity to be heard or represented before the Board. Compliance with the Award No. 6640 will deprive plaintiffs of their property rights without due process of law in violation of the 5th Amendment of the Federal Constitution.

4. Violation by defendant brakeman of the right of plaintiffs to be free from interference with their employment through the enforcement of void Award No. 6640 deprives plaintiffs of their property rights without due process of law.

5. The matter in controversy herein involved exceeds, exclusive (p. 7 begins) of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00) and the suit and controversy arises under the Constitution and laws of the United States.

6. The loss of the property rights herein mentioned by the plaintiffs constitutes irreparable injury for which there is no adequate remedy at law.

7. The plaintiffs have no adequate remedy at law; the enforcement of the said Order and Award No. 6640 renders inadequate any legal relief, and the plaintiffs' only relief is in a court of equity. A temporary injunction should issue to remain in effect until the disposition of this cause on the merits or the further order of this court so that pending the final hearing and determination of this action, no further injury should be inflicted upon these plaintiffs or other members of their class employed by the said Carrier Defendant and on whose behalf plaintiffs also sue.

WALTER J. LA BUY,
United States District Judge.

February 6, 1948.

Order for Temporary Injunction.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

That the defendants, The Atchison, Topeka and Santa Fe Railway Company, a corporation, Eastern and Western Lines; F. W. Coyle, as Vice President of the Brotherhood of Railroad Trainmen, a voluntary unincorporated association; C. D. Shepherd, J. W. McDonald, E. F. Allen, M. L. Pennebaker, C. E. Martz, J. J. Kain, C. E. Roger, D. W. Cole, their officers, agents, servants, employees, attorneys, representatives and all other persons combining with, acting in concert with, or under their direction, authority, control or advice, or under the direction, control, authority or advice of any of them, and all other persons acting under or through their authority or on their behalf or by virtue of their office held by any of the aforesaid defendants and all persons whomsoever, who are charged with the responsibility of the enforcement of the Order and Award No. 6640, Docket No. 7400, entered April 20, 1942, by The National Railroad Adjustment Board, First Division, and they are hereby severally enjoined and restrained specially in the enforcement (p. 8 begins) and execution of the provisions of the Order and Award entered April 20, 1942, by The National Railroad Adjustment Board, First Division, Award No. 6640, Docket No. 7400 and from enforcing or taking any steps to enforce the said Award by removing and displacing any of the said plaintiffs or members of the class or craft to which they belong solely under the provisions of the said Order and Award, from their positions as porter brakemen on trains No. 1, 2, 3, 2nd. 3, 2nd. 4, extra section 4, 5, 6, 9, 10, 15, 16, 1st. and 2nd. 23, 1st. and 2nd.

24, 27, 28, 47, 50 and other trains of the said defendant, The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines which positions they now hold and have held and occupied prior to the entry of the aforesaid Order and Award.

IT IS FURTHER ORDERED that the temporary injunction herein issued shall remain in effect until the disposition of this cause on the merits or until the further order of this court, conditioned upon the plaintiffs giving bond with good and sufficient surety, to be approved by the court, in the penal sum of $1,000.00 conditioned for the payment of such costs and damages as may be incurred or suffered by the defendants or any of them, or which the court may award to the defendants or any of them, if it shall be found that the defendants or any of them have been wrongfully enjoined or restrained by this Order. That in lieu of the bond herein mentioned, the plaintiffs or their attorneys on their behalf may deposit with the Clerk of this Court, the sum of $1,000.00 in cash or negotiable United States Government Securities with the Clerk of this Court, which said deposit shall be subject to the same terms and conditions of the bond herein mentioned.

DATED at Chicago, Illinois, this the 6th day of February, 1948.

ORDERED ENTERED:

WALTER J. LA BUY,
United States District Judge.

Nos. 661 and ~~771~~ 711.

In the Supreme Court of the United States

October Term, 1947.

A. PHILLIP RANDOLPH, *et al., Petitioners,*

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al., Respondents.*

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF

of petitioners Filed Under the Provisions of Section (a) Paragraph 4, Rule 38, of the Supreme Court of the United States.

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SUBJECT INDEX TO MATTERS PRESENTED.

Cases Cited.

Texts Cited.

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Nos. 661 and 771.

For convenience of reference, there is printed as an appendix the Findings of Fact and Conclusions of Law made and declared by the district court (Tr. 108-115).

I.

Respondents erroneously assume that the right established by the porters is one created or derived from the Railroad Labor Act, and that the act affords an administrative remedy for its violation.

Where Congress creates a right not theretofore existing and provides a remedy for its enforcement, it may be well enough to say that such remedy is exclusive. That is not this case.

The right established by the porters in this case is not a right granted by, nor is it in any way dependent upon, the Railroad Labor Act. This right, so established, existed before the act, was unmodified by the act, and exists today independently of the act. Such right is the common law right of a party to a contract for redress against one, not a party to the contract, who coerces the other contracting party to break the contract. Jurisdiction was not invoked as in a case arising under the laws and Constitution of the United States.

> "The jurisdiction of this Court is based alone by diversity of citizenship it has invoked nor based upon any contention by plaintiffs, nor does plaintiffs' petition disclose that it is a suit arising under the laws and Constitution of the United States." Declaration of Law 6, p. 115.

The wrong established, the sin against the common law, is the unlawful coercion of the carriers by the trainmen to cause the carriers to end their contract with the porters when the carriers, but for such coercion would continue operation under the contract with the resulting benefit to the porters. The act nowhere makes such conduct a violation of the act, nor does it provide a remedy for such common law tort. The illegality of such conduct springs

from the common law, not from the act. Jurisdiction to restrain such tortious conduct, irreparable injury being present, springs from fundamental jurisdiction of equity, not from any remedy created by the act. This being so, the hand of equity is not stayed until the porters exhaust an administrative remedy which in reality does not exist.

The situation is clearly illuminating by contrasting the Switchmen's case (320 U. S. 95), primarily relied upon by respondents, with the Steele (323 U. S. 192, 65 U. S. 226) and Tunstall (323 U. S. 210, 65 U. S. 234) cases. The Switchmen's case, by contrast, supports petitioner's application and is not in conflict with our contention.

The right in the one case (Switchmen's) was a right, not existing before, but created by the act which act which provided administrative procedure to protect and enforce such right. The right in the other cases (Steele and Tunstall) was essentially a common law right independent of the act. Fundamentally it was the right of a principal or beneficiary to demand that his agent or trustee should honestly and in good faith represent the rights and interests of those for whom he acts without hostile and unfair discrimination in favor of some and against others. The right of a principal or beneficiary to honest and fair representation was not created by the act. Such right was a fundamental common law right. It was the common law and not the act that imposed such obligation upon the bargaining agents and granted a corresponding right in those for whom the agency acted. In these two cases there was no controversy over the right of labor to organize and collectively bargain through agents of its own choosing. It was conceded that the Switchmen's Union was lawfully organized and conceded that it was the bargaining agent of the plaintiffs. It was the method of the union in bargaining that was in question, not the right of the union

representatives to bargain for plaintiffs. This was not so, however, in the Switchmen's case.

The right in the Switchmen's case was of labor to collectively bargain through representatives of its own choosing with corresponding obligation upon the employer to bargain in good faith with the employees. It was also a right of a majority of employees to bind nonconsenting minority. This was not a pre-existing right but one created by the act. Both the right to collectively bargain and the right of the majority to bind the minority *were created* by the act, *they did not exist at common law.* Congress having created such right, it was entirely appropriate for Congress to provide a procedure for protection and enforcement of the right so created, and this Congress did. The act provided, by specific procedure, protection and enforcement of the rights by it created under such conditions that it was entirely proper to hold that the remedy specified by Congress was exclusive.

Such holding is not in conflict with Steele and Tunstall nor with the district court in this case.

> "The act in Section 2, Fourth writes into the law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this act.' That 'right' is protected by Section 2, Ninth which gives the Mediation Board the power to resolve controveries concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. (Citing cases.) A review by the federal district courts of the board's determination is not necessary to preserve or protect that 'right.' Congress, for reasons of its own, decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top

of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, l. c. 301, 64 Sup. Ct. 95, l. c. 97.

The converse of the Switchmen's case is sound when the basis of that decision is considered, it is authority supporting the porters. Since the right here established is a common law right and did not spring from the act, since the act is silent as to such a situation, and since no administrative procedure is provided to right the common law wrong here committed, equity jurisdiction is not impaired. We submit no other conclusion can be drawn from the Switchmen's case.

Further contrasting the Steele and Tunstall cases with the Switchmen's case:

In the Steele and Tunstall cases, the act was the source of authority of the Switchmen's Union to represent and bargain for the craft, including Steele and Tunstall, and to bind a minority. The union representatives were accredited agents under the act. Those authorities and rights were not in question. It was the unlawful and discriminatory action of the bargaining agents in violation of their common law duty to Steele and Tunstall that constituted the cause of action against the union and its bargaining agents. Whether such conduct upon the part of the bargaining agents was lawful or unlawful depended upon application of general law, particularly the law governing the duties of a trustee to a beneficiary or agent to a principal. Such cause of action was not bottomed upon the Railroad Labor Act, nor any right granted thereby or administrative remedy based thereon. Hence it was

properly held that "the petitioner is without available administrative remedies, resort to which, when available, is prerequisite to equitable relief in the federal courts." (Tunstall case, 323 U. S., l. c. 214). That, in our judgment, is this case.

II.

The injunction against the carriers, particularly the preliminary injunction, was well within the jurisdiction of the court of equity incidental to and dependent upon the jurisdiction of the court to issue injunction against the trainmen.

Although the contract between the porters and the carriers is a contract at will, yet the porters have a legal right and interest in said contract. The right of the porters against the carriers under the contract is to place the carriers in a position of freedom in exercise of their judgment as to termination of contract without illegal interference, compulsion or coercion from others.

> "*Contracts terminable at will.* The fact that the contract is at will and terminable by either party at any time is of no consequence where neither party has attempted to revoke the contract and was not obliged to do so since each party to the contract has a manifest interest in the freedom of the other to exercise this judgment without illegal interference or compulsion." (32 C. J. 228.)

The proof, the court's finding and the carriers' answer, show without conflict that the carriers are content with the contract and desire it to continue and would continue it indefinitely if it were not for the coercion by the trainmen. (Finding VIII, p. 112; 476, 479, opinion lower court 640.)

Having issued this injunction against the trainmen restraining their coercion of the carriers, the court could

and should restrain the carriers from terminating the contract until the court could by its final injunction against the trainmen place the carriers in a position where they could exercise *their* free will and judgment as to terminating the contract, not merely reflect the will of the trainmen against the will of the carriers.

Once an equity court has jurisdiction of the subject matter and of the parties, it has full authority to grant and should grant full relief and to adjust in the one suit the rights and duties of all the parties which grow out of or are connected with the subject matter of the suit. While equity may not deny a legal right, yet it may restrain the exercise of such right for a reasonable time where the immediate exercise thereof would work unjust and irremediable harm to others. This is common practice in receivership and other heads of equity.

The carriers were proceeding to cancel the contract on June 30, 1946. The restraining order was issued June 24, 1946. Unless the court, temporarily at least, restrained the carriers, the carriers would have cancelled the contract and the entire status would have changed. It is entirely conceivable that a final injunction against the trainmen would be entirely unavailing if pending the litigation the carriers were not restrained.

Especially does a court of equity have broad discretion and sweeping authority to maintain the status quo *ante* until the final decree.

> "It is a well settled rule that a court of equity which has obtained jurisdiction of a controversy on any ground, or for any purpose, will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter, particularly with respect to the enforcement of its own decree, unless deprived of the

right to do so by statute; and this is true whether the question is of remedy or of distinct yet connected topics of dispute, and notwithstanding one of the parties declares that he does not ask affirmative relief but only wishes to be dismissed and left to enforce his rights in some other manner." (21 C. J., p. 134.)

"A court of equity ought to do justice completely, and not by halves; and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. *Camp* v. *Boyd*, 229 U. S. 530, 551, 552, 57 L. ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785, and cases cited." *McGowan* v. *Parish*, 237 U. S. 33, 35 Sup. Ct. 542, l. c. 548.

"That requirement is in harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. Pomeroy, Section 181, 231, *United States* v. *Union Pacific Railway Co.*, 160 U. S. 1, 52, 16 S. Ct. 190, 40 L. Ed. 319; *Camp* v. *Boyd*, 229 U S. 530, 551, 552, 33 S. Ct. 785, 57 L. Ed. 1317; *McGowan* v. *Parish*, 237 U. S. 285, 296, 35 S. Ct. 543, 59 L. Ed. 955; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 520, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Cf. Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 217, 218, 47 S. Ct. 357, 71 L. Ed. 612"; *Alexander* v. *Hillman*, 296 U. S. 222, 56 Sup. Ct., l. c. 211.

"Judgments in Equity.—The fundamental principle of equity in relation to judgments is, that the court shall determine and adjust the rights and liabilities concerning or connected with the subject matter of all the parties to the suit, and shall grant the particular remedy appropriate in amount and nature to each of those entitled to any relief, and against each of those who are liable, and finally shall so frame its decree as to bar all future claims of any party

before it which may arise from the subject matter, and which are within the scope of the present adjudication." 1 Pomeroy's Equity Jurisprudence, Fifth Edition, p. 154.

"The rule is well settled that the equity court having taken jurisdiction, full relief will be given between the parties. *Bureau of National Literature* v. *Sells, et al.*, D. C. 211 F. 379; *McGown* v. *Parish*, 237 U. S. 285, 35 S. Ct. 543, 59 L. Ed. 955; *Smith* v. *American National Bank*, 8 Cir., 89 F. 832, 839, 840; *Krohn* v. *Williamson, et al.*, v. *Monroe*, C. C. 101 F. 322; *Chicago, M. & St. P. Ry. Co. of Idaho* v. *United States*, 9 Cir., 218 F. 288." *Banco* v. *Boscana*, 100 Fed. (2d) 449, l. c. 452.

III.

Inability of Negro porters to obtain fair trial before the adjustment board on account of racial prejudice.

The trainmen say that the porters cannot raise this question because the trainmen did not resort to the Adjustment Board but submitted nothing thereto for hearing and decision (Trainmen's brief in opposition, page 34). Manifestly, such position is not tenable. The porters say they have a right to proceed in equity and that there is no adequate remedy before the Adjustment Board. The trainmen's position, therefore, is that the porters must surrender their right in equity and apply to the Adjustment Board before they may contend that the proceeding before the board is an inadequate remedy.

On the question of prejudice on the part of the board, we quote from Findings of Fact—VII (112)—as follows:

"The First Division of said Railroad Adjustment Board has jurisdiction over disputes between employers and employees (fol. 128) (but not disputes between different groups of employees), involving

> train and yard service employees of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen, and yard service employees. Said board consists of ten members, five of whom are designated by the carriers and five of whom are selected and designated by the national labor organizations of the employees, over which Division 1 is given jurisdiction, including trainmen. The national organization of train porters are all Negroes. No national labor organization of employees, falling within the jurisdiction of the First Division of the Railroad Adjustment Board, will permit a Negro to be a member of any such labor organization, but on the contrary, for many years Negroes have been consistently and (uniformly) excluded from membership therein."

See also pages 519, 484, and 582 of the printed record.

Respondents say that this pertains only to the Adjustment Board and not to the Mediation Board. That is true, but our submission is that it is a complete answer to respondents' contention that the porters had an adequate remedy before the Adjustment Board, which contention was sustained by the court of appeals. The fact that the porters do not have an adequate remedy before the Mediation Board is based upon other and different considerations. See page 35 of petitioners' brief in support of application.

A prejudiced Adjustment Board in the Steele case was one of the grounds for the Supreme Court holding that the plaintiff did not have an adequate remedy before the board (323 U. S., l. c. 206). The court said:

> "Further, since Section 3, First (c) permits the national labor organizations chosen by the majority of the crafts to 'prescribe the rules under which the labor members of the Adjustment Board shall be

selected' and to 'select such members amd designate the division on which each member shalll serve,' the Negro fireman would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made." *Steele* v. *Railway,* 323 U. S., l. c. 206.

To hold that the porters have an adequate remedy before the Adjustment Board is contrary to precedent and to law, and is in violation of fundamental principles of justice.

IV.

We re-emphasize that this is a case peculiarly calling for the issuance of the writ of certiorari.

The case involves the construction of an extremely important statute of the United States concerning which there is confusion, if not direct conflict,, among the decisions. Confusion in decisions as to the meaning of important statutes is a fruitful source of certiorari. This situation cries for a decision by the supreme court in clear and unmistakable language as to the meaning and effect of the act in some of its most important aspects. The question deals with vital transportation and prevention of interruptions therein.

The petition for certiorari by the carriers emphasizes the necessity for a clarifying decision by the Supreme Court. If the Adjustment Board has jurisdiction, as contended by the trainmen, then the carrier is subject to two independent proceedings. One before Division One by the trainmen and a simultaneous proceeding before Division Four by the porters. It is conceivable that the two divisions will conflict and it is possible that Division One would decide in favor of the trainmen and Division Four decide in favor of the porters. The carrier may not, under

the act, have a judicial review of either or both such decisions. Such judicial review is solely for the employee and not for the employer. There are decisions which, it is claimed, hold that the Adjustment Board does have such jurisdiction and there are others that hold it does not. We hold no brief for the carriers. We submit, however, the position in which the carriers will be left if the decision of the court of appeals is to stand is a powerful argument in favor of the Supreme Court clarifying the situation by certiorari.

The Norris-LaGuardia Act does not apply.

The Act does not prohibit injunction except under certain conditions. Absent such conditions the court may issue injunction in a labor case (*Interstate Ass'n* v. *Pauly*, 118 F. (2d) 615).

The provision concerning inability or refusal of local officials to preserve order manifestly is not applicable. The provision (Sec. 108) requiring "*reasonable* effort to settle" is not applicable because such effort would have been futile and "the law will not force anyone to do a thing vain and fruitless." Broom, Legal Maxims, Eighth Edition 210; 36 C. J. 1048; *Donnelly Garment Co.* v. *International*, 99 Fed. (2d) 309.

Without notice to, or knowledge of, the porters, the trainmen served a ten-day ultimatum on the carriers (Ex. M., Tr. 239-41). The carriers were about to throw the porters to the wolves. There was no time even to give notice of application for restraining order (Tr. 16).

The court "on testimony under oath," on application for restraining order found and decreed:

> "The court doth find that unless a temporary restraining order shall be issued herein without notice, a

substantial and irreparable injury to complainants' property will be unavoidable, and the court doth find upon said verified complaint, affidavits in support thereof, and testimony under oath that plaintiffs are entitled to a temporary restraining order without notice" (Tr. 16).

Manfestly, a requirement that the porters should use the few precious days left them trying to settle would be, not "a reasonable," but an unreasonable requirement.

Respectfully submitted,

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APPENDIX.

Findings of Fact by the District Court.

I.

Wherever in these findings there occurs the expression "Disputed Work" or "Services in Controversy," it is intended thereby to mean the six classes of service specified in the letter by E. E. Bryan, general chairman of the Brotherhood of Railroad Trainmen, M-K-T Lines, to O. W. Campbell, assistant manager of said lines, dated April 1, 1946, which is Exhibit M to the stipulation of facts, which classes of service are as follows:

1. Inspect cars and trains and test signal and brake apparatus for the safety of train movements, as per carrier's rules.
2. Use hand and lamp signals for the protection and movement of trains and engines, including the necessary flag protection on the head end of trains, or through block.
3. Open and close switches and derails for switching and for the movement of trains and engines en route; around Wyes; and at some terminals.
4. Couple and uncouple cars and engines and the hose and chain attachments thereof, both en route and at some passenger terminals.
5. Pick up, set out, place, and switch loaded and occupied passenger cars en route and at some passenger terminals.
6. Read the conductor's train orders and familiarize himself with them to determine where opposing trains are to be met or passed, and observe position of all train order signals and see that train orders affecting the movement of trains are picked up en route.

The expression "trainmen" means Brotherhood of Railroad Trainmen, and members thereof who are employed by defendant carriers, and "train porters" means Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants, and members thereof who are likewise employed by such carrier.

By the expression "defendant carriers" is meant, Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas.

II.

For more than 40 years on the system of defendant carriers, train porters pursuant to custom and contract be-
(fol. 125) tween them and the carriers have consistently and without interruption performed all six classes of service and duties herein called Services in Controversy.

III.

For a long time prior to March, 1921, the train porters, pursuant to long, uniform, uninterrupted and mutally understood and agreed upon custom, had performed, on the system of defendant carriers, all six classes of services and duties herein called Services in Controversy. In March, 1921, the individual train porters entered into individual contracts with the then receiver of defendant carriers, which contracts expressly provided that train porters should perform all said services; (Pltf's Ex. #.....).

On July 1, 1921, the parties (train porters and the defendant carriers) entered into a further written contract which expressly provided, "Train porter, when on duty, will be under the jurisdiction of the conductor and will perform such duties as may be required." On December 1, 1928, the said parties entered into a further written contract containing the same express provision. This latter contract has without interruption continued in operation

until the present day. The actual performance of duties by the train porters, including the Services in Controversy, was in no respect changed after any or all said written contracts were entered into, but on the contrary, train porters continued to perform the same duties in the same manner to the present date as they had performed long prior to the first written contract in March, 1921.

IV.

Prior to 1946 and particularly prior to Mr. Bryan's letter to Mr. Campbell dated April 1, 1946 (Ex. M), the trainmen of defendant carriers over a long period of time, being fully cognizant, acquiesced in, or at least did not protest against, performance by the train porters of the Services in Controversy. The several complaints by individual trainmen introduced in evidence did not amount to a general protest by the trainmen against performance by train porters of said services. These complaints consisted of a letter by Mr. Lewis to Mr. Williams dated September 21, 1919; complaints by three individual trainmen to the [fol. 126] United States Labor Board decided April 9, 1924; and the complaint of yardman Shannon decided June 26, 1941. The complaints to the Labor Board were not against trainmen being permitted to perform the Services in Controversy but were complaints of given trainmen in given instances being excluded from such service. The complaint of yardman Shannon was that on a given instance, a train porter had performed the duties of an engineer or yardman in the actual operation of an engine in the yard, a service not included in the Services in Controversy. These complaints neither individually nor collectively are, in light of the entire record, sufficient to prove that the trainmen did not acquiesce generally in the performance by train porters of the Services in Controversy.

V.

The Court finds the fact to be that neither the Brotherhood of Railroad Trainmen nor the members thereof have now, nor as far as the evidence shows, ever have had a contract written or oral with defendant carriers giving to the trainmen the exclusive right to perform all or any of the Services herein called Services in Controversy. Nor have the trainmen any such exclusive right based upon custom or practice on the system of defendant carriers. The custom and practice for at least 40 years has been directly to the contrary.

VI.

On the question of duress, fraud, undue influence and unlawful pressure, by the trainmen against defendant carriers to induce the carriers to terminate their contract with the train porters and to abrogate and abolish the custom and practice of train porters performing the Services in Controversy, the Court finds the facts to be:

Early in 1946 the trainmen, acting through Mr. E. E. Bryan, thereunto authorized by the trainmen, threatened to the carriers that unless within ten days thereafter the carriers took away from the train porters, and gave to the trainmen, the performance of all of the services by the porters, herein called Services in Controversy, then in each instance where a train porter performed any act falling within the Services in Controversy, a trainman would file [fol. 127] a claim against the carriers for a full day's pay as trainman on the run in question, even though another trainman had served upon and been paid for such run, and even though the act performed by the train porter was but a single act such as throwing a switch.

Over six hundred of such claims were actually filed by the trainmen prior to the issuance of the restraining order herein. Mr. Bryan, on the witness stand, stated that if not prevented by injunctive orders the trainmen would file and continue to file such claims in every instance where any train porter on any passenger run performed even a single act of the Services in Controversy, until the carriers took all work falling within the Services in Controversy away from the train porters and gave it to the trainmen. The evidence shows that up until the present time the amount of such claims, figured upon the basis hereinbefore stated, would amount to more than $150,000.

At a conference between Mr. Bryan and Mr. Campbell, and in connection with the demands being made by the trainmen, Mr. Bryan called attention to the fact that on the Frisco system the trainmen had taken a strike vote because that road had refused to take similar work away from their train porters and give it to their trainmen, and also because that road had refused to pay claims similar to the claims of the trainmen then being made against defendant carriers.

At that time and place Mr. Bryan further called attention of Mr. Campbell to the alleged fact that under similar circumstances the Railroad Adjustment Board and Division 1 thereof had allowed such claims in the case of other railroads on account of train porters being permitted on such roads to perform similar services.

VII.

The trainmen have threatened, unless enjoined, to bring before Division 1 of the National Railroad Adjustment Board, all of the claims made and to be made by the trainmen on account of train porters performing any act of the Services in Controversy, which claims have been estimated to this time to amount to approximately $150,000.00.

VIII.

Mr. O. W. Campbell, Assistant Manager of defendant carriers, in explanation to authorized representatives of the train porters as to why the carriers were submitting to the demands of the trainmen and [conceling] the contract with the train porters, stated, and the Court finds the fact to be, that the services of the train porters had been entirely satisfactory throughout the years; that the carriers had been entirely content with the contract between the train porters and the carriers and the company desire to continue such contract indefinitely, and would do so if it were not for the pressure being brought on the carriers by the trainmen; that the Brotherhood of Railroad Trainmen was a powerful economic factor and the carriers could not financially stand a controversy with them in the premises, particularly in respect to the claims by the trainmen filed and threatened to be filed, for [anormous] amounts before the Railroad Adjustment Board, especially in light of certain decisions by the Board against other carriers; that the situation was pathetic but that the carriers were powerless to do otherwise.

IX.

The trainmen are not parties to the contract between the train porters and the carriers and have neither right or obligation thereunder.

[fol. 129]

X.

If the plaintiffs are not afforded injunctive relief as prayed the train porters will suffer immediate and irreparable damage on account of which they have no adequate remedy at law. Some, but not all, specifications of such damages are:

Many of the porters, including some who have served for as much as forty years, will lose their jobs;

Those remaining in the service will have their hours of service increased and rates of pay materially lowered;

They will have their pension rights reduced;

Their seniority rights will be impaired;

They will no longer be subject to the limitations of the 16-hour Continuous Service Law (Title 45 U.S.C.A. Sec. 62).

Declaration of Law Made by the District Court.

I.

Defendants have maliciously, that is in the sense of doing a wrongful act without lawful justification or excuse, sought to induce, and but for the restraining order herein, would have induced the defendant carriers to terminate their contract with the train porters, and to take from the train porters the performance of the Services in Controversy when both parties to such contract and custom were content therewith and desired to continue the same indefinitely and would have so continued the same had it not been for the wrongful acts of the defendants described and specified in the Findings of Fact. The Court declares the law to be that such conduct is inequitable, oppressive and unlawful, and such conduct, irreparable injury being present and adequate remedy at law being absent, should be and will be enjoined.

II.

Plaintiff's petition states, and the evidence establishes, a cause of action at common law, which is not depended on, nor is it limited by the provisions of the Railway Labor Act.

[fol. 130] III.

The Court declares the law to be that the acts and conduct of the defendants as recited in the Findings of Fact, constitute fraud and duress and are a common law tort, on account of which plaintiffs are entitled to injunctive relief.

IV.

In the construction of the written contracts, particularly the contract of December 1, 1928, between the train porters and the defendant carriers, it is the duty of the court to take into consideration, and give due weight to, the prior contractual relationship of the parties and any uniform and uninterrupted practice and custom of the parties in relation to the subject matter of the contract; and to consider and give due weight to the practical and day-to-day construction that the parties put upon the contract after the same was entered into. The principle of law was expressed by Lord Eldon.

> "Tell me what you have done under the contract and I will tell you what the contract means."

Considering the express terms of the contract and giving proper weight to the foregoing principles and other judicial canons of construction, the court finds that the Services in Controversy, fall within the provision of the contract of December 1, 1928,

> "Train porters when on duty, will be under the jurisdiction of the conductor and will perform such duties as may be required,"

and that said contract embraces the Services in Controversy.

V.

This is a typical and proper class action, both as regards plaintiffs and defendants as defined under Federal Rules of Civil Procedure, and particularly Rule 23.

VI.

The jurisdiction of this Court is based alone upon diversity of citizenship. It is not invoked or based upon any contention by plaintiffs, nor does plaintiffs' petition [diesclose], that it is a suit arising under the Laws and Constitution of the United States.

No. 661

In the

Supreme Court of the United States

OCTOBER TERM, 1947

A. PHILLIP RANDOLPH, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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To the Honorable, the Supreme Court of the United States:

Petitioners' statement of the case is incomplete and in some respects is erroneous and misleading. For this reason respondents Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas set forth their own statement of the case.

OPINIONS BELOW

The opinion of the District Court is reported in *68 F. Supp. 1007*. The opinion of the Circuit Court is reported in *164 F. (2d) 4*, Pamphlet Advance Sheet No. 1, dated December 22, 1947.

STATEMENT OF THE CASE

Nature of the Suit

This is a suit for an injunction (Complaint, R. 2-16; Amended, R. 34-35, 74-75).

Jurisdiction is predicated upon diversity of citizenship and the requisite amount (R. 2).

The complaint was filed on June 24, 1946 (R. 16) by A. Phillip Randolph, International President of the Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants; other officers of the Brotherhood; William P. Orr and six other individuals; the above mentioned Brotherhood; and Local Train Porters Union No. 3 (R. 1), as a class action on behalf of a group known as "Train Porters", employees of defendants Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas (R. 3).

Defendants below were Missouri-Kansas-Texas Railroad Company, a Missouri corporation; Missouri-Kansas-Texas Railroad Company of Texas, a corporation of the State of Texas; E. R. Bryan, General Chairman of the Brotherhood of Railroad Trainmen on the lines of railroad operated by

the defendant railroad companies; other officers of the Brotherhood and its local lodges; and the Brotherhood of Railroad Trainmen (R. 1). It was alleged that the defendants, except the railroad companies, represent a group known as "Railroad Trainmen", employees of defendants Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas (R. 3).

The purpose of the suit is to compel the railroad defendants to continue using train porters, as well as other employees, in the performance of the following duties relating to train movements:

> "(1) Inspection of cars and trains and test signal and brake apparatus for safety of train movement;
>
> "(2) The use of hand and lamp signals for the protection and movement of trains and engines, including necessary flag protection on the head end of trains or through blocks;
>
> "(3) Opening and closing switches and derails for switching and for the movement of trains and engines en route, and at some terminals;
>
> "(4) Coupling and uncoupling cars and engines and the hose and chain and attachments thereof en route and at some passenger terminals;
>
> "(5) Pick up, set out, place and switch loaded and occupied passenger cars en route and at some passenger terminals;
>
> "(6) Read the Conductors train orders and familiarize himself with them to determine where opposing trains are to be met or passed and observe position of all order signals and see that train orders affecting the movement of trains are picked up en route" (R. 6, 13).

The railroad defendants filed a cross-claim against their co-defendants and the plaintiffs in this action seeking a judgment declaring, among other things, the rights and other legal relations and obligations of all of the parties (R. 87-93).

Factual Background

In order that the Court may fully understand the issues in this case, respondents set forth the essential facts antedating this litigation.

Conductors, brakemen, train porters, and other employees of the railroad defendants now perform and for many years have performed interchangeably for said defendants the work in controversy (R. 537-540).

Neither the current agreements (R. 229-234, 252-295) nor the former agreements (R. 225-229; Exhibits A to F to the Stipulation of Facts, omitted in printing, R. 220, 653-655) between the railroad defendants and their train porters, conductors and brakemen, specify who shall perform such work.*

By letter dated April 1, 1946 (R. 239-240), the Brotherhood of Railroad Trainmen protested the use by the railroad defendants of any employees other than brakemen in the performance of said work, stating:

> "Unless the practice of requiring or permitting these employees to perform brakemen's duties is discontinued within ten (10) days from the date of this

* The Circuit Court so found: "* * * neither the agreement between the railroad companies and the train porters, nor that between the railroad trainmen and the railroads, states in so many words that the railroads agree to give the work in question to either of the groups or both" [R. 700; 164 F. (2d) 7].

letter, claim will be filed for each available brakeman on M-K-T Lines first out on extra board at time such train is run on which this service is performed by other than a qualified brakeman, on the same basis as though such brakeman was used to perform all of the brakemen's duties and work on such passenger trains" (R. 240-241).

Prior to making this protest, the Brotherhood of Railroad Trainmen had procured from the First Division of the National Railroad Adjustment Board four Awards on other railroads to the effect that those companies violated their agreements with the brakemen when they permitted train porters to perform work similar to the work now in controversy, to wit:

Award No. 5906, Docket 9898, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit X to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 5907, Docket 9899, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit Y to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 6640, Docket 7400, dated April 20, 1942, involving The Atchison, Topeka and Santa Fe Railway Company—Eastern and Western Lines (Exhibit W to Stipulation of Facts, not printed; R. 220, 223, 655); and

Award No. 7251, Docket 14777, dated September 3, 1942, involving The Texas and Pacific Railway Company (Exhibit Z to Stipulation of Facts, not printed; R. 220, 223, 655).

In Awards 5906, 5907 and 7251, the National Railroad Adjustment Board, without a Referee, sustained the com-

plaint or claim "without retroactive adjustment in compensation"; but in Award 6640*, the Board, by Referee James B. Riley, after holding that the use of porters violated the seniority rights of brakemen, declared:

> "It follows that protest and specific claim should be sustained. Claim that like settlement shall be made in all instances of similar nature now on file is likewise sustained" (page 18).

Confronted with these Awards and the positive declaration of the Brotherhood of Railroad Trainmen that claims would be filed if train porters continued to perform any of this work (R. 240-241), the railroad defendants decided to discontinue using train porters for this service. Accordingly, the railroad defendants gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156). The original date of May 16, 1946 (R. 242), on which said use of train porters was to have been discontinued, was postponed (R. 246) and later changed to June 30, 1946 (R. 250). The services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

Proceedings in the District Court

The train porters commenced this suit on June 24, 1946 (R. 16). Among other things, it was alleged that the train porters, both by contract and custom, for more than sixty years (R. 7) have performed the work in controversy

* Enforcement temporarily enjoined on February 6, 1948; Appendix to Petitioners' Brief, page 58.

(R. 6). Plaintiffs also alleged that the railroad defendants, unless enjoined and restrained (R. 12), would take said work away from the train porters because of "fraud, duress, threats and undue influence" exerted and threatened to be exerted by the Railroad Trainmen (R. 5).

The train porters were fully informed of the claims which the Brotherhood of Railroad Trainmen had threatened to file against the railroad defendants (R. 10) and, in further support of their action, the train porters asserted that the Railroad Trainmen, unless restrained and enjoined, would "carry out the aforesaid threats", would "continue to bring pressure upon the railroad companies", and would "continue to subject them to such duress and threats that the railroad companies are helpless not to cancel said contract" (R. 12).

Upon the verified complaint (R. 2-16), the District Court granted a temporary restraining order on June 24, 1946, which declared:

> "That the Brotherhood of Railroad Trainmen and all the officers and members thereof, be restrained and enjoined from seeking to enforce their demands described in the complaint, by claims and suits against the railroad companies or otherwise, and be enjoined from interfering with the contractual relations between the Train Porters and the railroad defendants, and from in any manner seeking to cause the railroad companies to repudiate and violate the contract and custom described in the complaint" (R. 17); and
>
> "That the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and their agents, officers and representa-

> tives, be and they are hereby restrained and enjoined from violating the terms of the contract pleaded in the complaint, and of the agreed custom therein described, and are enjoined from disturbing the status of plaintiffs as it now exists under said contract and custom, and from taking from the plaintiffs the performance of the duties performed by the Trail (Train) Porters as described in said complaint, and be enjoined from complying with the demands of the Brotherhood of Railroad Trainmen in the premises" (R. 17).

In support of the temporary restraining order, plaintiffs posted a $500.00 bond (R. 18-19).

On September 10, 1946, the railroad defendants filed a motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). After hearing evidence on the motion (R. 199-210), the District Court handed down a Memorandum Opinion on October 28, 1946 (R. 634-639), directing counsel to prepare an order overruling the motion of the railroad defendants to increase the amount of the temporary restraining order bond (R. 639). In reaching this decision, the District Court was not guided by the evidence of damages which the railroad defendants might suffer or incur because of the temporary restraining order, as contemplated by Rule 65(c) of the Federal Rules of Civil Procedure, but by the Court's belief that plaintiffs were entitled to injunctive relief. The Court said:

> "In this case, upon the pleadings, upon the arguments of counsel, and upon all of the assumed facts, the plaintiffs are clearly and unquestionably entitled to a temporary restraining order and temporary injunction. A valid and subsisting contract held by them

is admittedly threatened and it is not denied but that they would suffer irreparable damage.

"In view of the admitted facts, the plaintiffs are not wrongfully enjoining the corporate defendants and the individual defendants. At this early stage of the proceeding, and upon the admitted facts, the plaintiffs have the undeniable right to restrain the abrogation or breach of their contract and to restrain the individual defendants from an endeavor to induce its abrogation or breach. Under such circumstances the plaintiffs ought not to be required to pledge additional security for damages that might and doubtless will accrue to the corporate defendants, but for which the plaintiffs would in no wise be responsible or at fault" (R. 639).

On November 9, 1946, the railroad defendants filed a motion (R. 61-68) to modify and vacate portions of the Memorandum Opinion dated October 28, 1946, pointing out the error of the District Court in refusing to increase the amount of the temporary restraining order bond solely because the Court was of the opinion that plaintiffs were entitled to an injunctive order (R. 66-68). In reply, the District Court on November 22, 1946, filed a Supplemental Memorandum Opinion (R. 640-646) to the effect that the amount of a bond is discretionary with the Court (R. 643) and that the motion to increase the bond should be denied because (1) the damages would have accrued without the issuance of the temporary restraining order (R. 644-645), and (2) a bond should not be required for the purpose of paying debts (R. 643). Consequently, the District Court erroneously held that:

"The statute and the rule providing the security in injunctive proceedings did not contemplate damages

of the character involved or discussed in this proceeding" (R. 645).

Accordingly, the District Court on November 30, 1946 (R. 75), entered an order overruling the motion of the railroad defendants to increase the amount of the temporary restraining order bond (R. 42-52) and their motion to modify and vacate portions of the Memorandum Opinion dated October 28, 1946 (R. 634-639).

By successive orders of the District Court (R. 19, 35, 75), the temporary restraining order was kept in effect until issuance of a temporary injunction on March 5, 1947 (R. 160-163) which followed hearings on January 20, 21, 22, 1947 (R. 86, 107, 210-633). The temporary injunction ordered and adjudged:

> "That the Brotherhood of Railroad Trainmen and all the members thereof now engaged in working for the defendant railroad companies be and they hereby are restrained and enjoined from seeking to enforce their said demands by claims and suits against the railroad companies, defendants; and they are further enjoined and restrained from coercing said railroad companies by threatening to file or by filing claims arising from the work performed by the plaintiffs; and they are further enjoined and restrained from interfering in any way whatever with the contractual relations, as above stated, between the Train Porters and the Railroad Companies, by inducing or coercing said Railroad Companies to repudiate, abrogate, cancel or violate their contract obligations with the plaintiffs, Train Porters" (R. 162-163); and
>
> "That the defendant railroad companies be and they hereby are temporarily enjoined and restrained from violating the terms of the contract hereinbefore

mentioned and from disturbing the status of the plaintiffs under said contract with all modifications thereof, including customs and habits indulged and approved; and the said railroad companies are enjoined from taking from the plaintiffs the performance of the duties heretofore rendered by them and now being rendered by them pursuant to said contract; and the said railroad companies are further enjoined from complying with or yielding to demands of the Brotherhood of Railroad Trainmen" (R. 162).

Also included in the temporary injunction was an order that:

"plaintiffs enter into an obligation in the way of security in the sum of Five Hundred ($500.00) Dollars for the payment of such costs and damages as may be incurred or suffered by any party who may have been found to have been wrongfully enjoined or restrained hereby, or that the bond or security heretofore given on the temporary restraining order to the same effect and for the same purposes be continued as security herein" (R. 163).

On March 20, 1947, the railroad defendants filed a motion to dissolve the temporary injunction (R. 170-175) on the grounds (1) that there is no legal basis for the injunction since no cause of action is either pleaded or proved against the railroad defendants (R. 171-172), and (2) the $500.00 bond, under the undisputed evidence, does not satisfy those provisions of Rule 65(c) of the Federal Rules of Civil Procedure which expressly prohibit the issuance of a temporary injunction unless and until the Court has required the applicant therefor to give security conditioned upon "the payment of such costs and damages as may be

incurred or suffered by any party" who may be found to have been wrongfully enjoined and restrained (R. 172-174).

Subject to their motion to dissolve, the railroad defendants also filed another motion on March 20, 1947, asking that the amount of the temporary injunction bond be increased from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect said defendants against the payment of such costs and damages as they might suffer or incur if they, or either of them, are found to have been wrongfully enjoined or restrained (R. 176-180).

The motion of the railroad defendants to dissolve the temporary injunction and their alternative motion to increase the amount of the temporary injunction bond were overruled on March 29, 1947 (R. 183).

Potential Damages

By letter dated April 1, 1946, the Brotherhood of Railroad Trainmen threatened to commence the filing of claims on behalf of individual brakemen if the railroad defendants did not, within ten days, discontinue using employees other than brakemen in the performance of the work in controversy (R. 239, 240-241).

Between April 11, 1946, and June 24, 1946, when this suit was filed and the temporary restraining order was issued (R. 16, 19), 688 claims totaling $6,447.00 had been filed against the railroad defendants (R. 540) and their potential liability for that period was $38,617.50 (R. 542).

A hearing was held on September 14, 1946 (R. 200) on the motion of the railroad defendants to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). According to the undisputed evidence, claims of the brakemen against the railroad defendants were then accruing at an approximate rate of $520.00 per day (R. 201). Subsequent to the hearing and before the Court ruled on the motion, a check of operations was made during the month of October 1946. It revealed that the claims of the brakemen were accruing at the rate of $514.90 per day (R. 73). An affidavit to that effect by A. F. Winkel, an officer for the railroad defendants (R. 72), was filed on November 16, 1946 (R. 73), fourteen days before the Court on November 30, 1946 (R. 75) overruled the railroads' motion to increase the amount of the temporary restraining order bond.

Had the temporary restraining order not been issued, the railroad defendants, at midnight on June 30, 1946, would have discontinued using train porters to perform the work in controversy (R. 250). Because of the temporary restraining order, the railroad defendants continued to permit train porters, as well as other employees, to do the work. Claims of the brakemen are accruing on each day that train porters perform the work (R. 240-241, 208-209). At the rate of $514.90 per day, said claims totaled $78,779.70 for the period July 1, 1946, to November 30, 1946, when the Court overruled the motion to increase the amount of the temporary restraining order bond (R. 75).

Mr. Winkel was a witness at the hearing on plaintiffs' application for a temporary injunction on January 22, 1947 (R. 543). He testified that the railroad defendants were being subjected to a daily potential liability of $514.90 (R. 542). At that rate, said claims totaled $127,695.20 for the period July 1, 1946, to March 5, 1947, when the temporary injunction was issued upon plaintiffs' giving a $500.00 bond (R. 160-163), and they totaled $140,052.80 when the Court on March 29, 1947, overruled the motion of the railroad defendants to increase the amount of the temporary injunction bond (R. 183).

As a result of the issuance of the temporary restraining order and the temporary injunction, the potential liability of the railroad defendants will amount to $329,536.00 on March 31, 1948, and such potential liability thereafter will increase at the rate of $514.90 per day (R. 542).

Proceedings in the Circuit Court

Three appeals, Civil Actions Nos. 13564, 13565 and 13566, were prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit and were consolidated by order of that Court dated May 26, 1947.

In Civil Action No. 13564, the railroad defendants appealed (R. 156-157) from those portions of the order of the District Court dated November 30, 1946 (R. 74-75), which (a) overruled the railroads' motion to increase the amount of the temporary restraining order bond (R. 42-50), and (b) overruled the railroads' motion (R. 61-68) to modify and partially vacate the Memorandum Opinion of the District Court dated October 28, 1946 (R. 634-639).

In Civil Action No. 13565, the railroad defendants appealed (R. 187-189) from those portions of the order of the District Court dated March 5, 1947 (R. 160-163), which granted a temporary injunction against the railroads, and from the order of the District Court dated March 29, 1947 (R. 183), which (a) overruled the railroads' exceptions to the form of the temporary injunction (Original Record 187-193; Omitted in Printing, R. 649, 651-652), (b) overruled the railroads' motion to dissolve the temporary injunction (R. 170-175), and (c) overruled the railroads' alternative motion to increase the amount of the temporary injunction bond (R. 176-180).

In Civil Action No. 13566, the Brotherhood of Railroad Trainmen and other defendants in the District Court (R. 184-185) appealed from the order of March 5, 1947, which granted a temporary injunction against them (R. 160-163).

All appeals were presented on a single record.

In the Circuit Court the railroad appellants urged the following points:

> "1. The temporary injunction should be dissolved because plaintiffs neither pleaded nor proved a cause of action against the railroad defendants".
>
> "2. The railroad defendants had the legal right to terminate their agreement with the train porters at midnight on June 30, 1946, and thereafter to negotiate a new agreement with their train porters which would exclude the work in controversy".
>
> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the

issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".

"4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction" (Brief, pages 20-23).

The opinion of the Circuit Court (R. 695-705) is reported in *164 Fed. (2d) 4-9*, Pamphlet Advance Sheet No. 1, dated December 22, 1947. In accordance with that opinion, the Court remanded the causes to the District Court with direction to dissolve the temporary injunction and for further proceedings in accordance with that opinion (R. 708). A petition for rehearing filed by the train porters (R. 709-713) was denied (R. 715); and on motion by the train porters (R. 715-716), the mandate was stayed pending application for a writ of certiorari (R. 718-719).

The Brotherhood of Railroad Trainmen and its officers contended in the Circuit Court, as they did in the District Court, that—

> "the facts pleaded as well as the facts shown in evidence in this case, disclose that the controversy presented is a jurisdictional labor dispute within the purview of the Railway Labor Act, 45 U. S. C. A. 151, et seq., and a labor dispute within the meaning of the Norris-LaGuardia Act, 29 U. S. C. A. 101, et seq." [R. 698; *164 Fed. (2d) 6*].

The Brotherhood of Railroad Trainmen and its officers also contended,—

> "that the District Court should not have undertaken to interpret the agreements of the passenger train porters or of the railroad trainmen with the railroads for the purpose of settling by injunctional orders or decree, the dispute as to whether one or both of the two classes of employees, the train porters and the trainmen, should perform the work in question" [R. 698-699; *164 Fed. (2d) 6*]; and that,—

> "the court should have stayed exercise of its power to issue injunctional orders and should have relegated the parties to the tribunals specifically provided by Congress in the Railway Labor Act for mediation and for determining the interpretation and application of collective bargaining contracts such as are shown to be involved in this case, in order to finally settle the labor dispute arising out of them, and that the issuance of the temporary injunction in the first instance was erroneous" [R. 699; *164 Fed. (2d) 6*].

Sustaining these contentions, the Circuit Court held that,—

> "the issuance of the temporary injunction was erroneous in view of the statutes and the decision of the Supreme Court in Order of Railway Conductors v.

Pitney, 326 U. S. 561, 66 S. Ct. 322, 325, 90 L. Ed. 318" [R. 699; *164 Fed. (2d) 6*].

The Circuit Court also rejected the plea of the train porters that the injunction sought is not within the purview of the Federal Acts because the trainmen were guilty of "wrongful conduct amounting to tort, committed and threatened against the railroads to compel the railroads to breach or cancel their contracts with the porters". The Court stated that "examination of the record convinces that there was no substantial evidence tending to show that the defendant trainmen have committed or threatened any such actionable tort" [R. 701; *164 Fed. (2d) 7-8*].

The Circuit Court also ordered a dissolution of the temporary injunction against the railroad companies because:

> "* * * the temporary injunction, insofar as it runs against the railroads, was induced solely by the court's conclusion that the trainmen were guilty of past and threatened tortious conduct, wrongfully coercing the railroads into their proposed action, which it considered enjoinable. It is clear from the record that no injunction would have been issued against the railroads except upon that consideration and such was the theory of the plaintiffs' case as against the railroads. *The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned.* Our conclusion that there was no tortious conduct on the part of the trainmen justifying the temporary injunction against them therefore necessitates that it be dissolved as to the railroads as prayed in their appeal" (Our italics) [R. 704-705; *164 Fed. (2d) 9*].

In this connection, the Circuit Court found:

> "The railroads were about to accede to the demands of the trainmen and intended, *after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156*, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" (Our italics) [R. 697-698; *164 Fed. (2d) 5-6*].

The Circuit Court thus sustained Points 1 and 2 urged by the railroad appellants, reading as follows:

> "1. The temporary injunction should be dissolved because plaintiffs neither pleaded nor proved a cause of action against the railroad defendants".

> "2. The railroad defendants had the legal right to terminate their agreement with the train porters at midnight on June 30, 1946, and thereafter to negotiate a new agreement with their train porters which would exclude the work in controversy".

But the Circuit Court did not pass upon said appellants' Points 3, 4, 5, and 6, to wit:

> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".

> "4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction".

The net result is that the respondent railroad companies have been given a $500.00 bond to protect them against a potential liability of $329,536.00, as of March 31, 1948, which is increasing at the rate of $514.90 per day, solely as a result of the temporary restraining order and the temporary injunction which the Circuit Court has declared never should have been issued.

ERRONEOUS STATEMENTS AND INFERENCES BY PETITIONERS

As heretofore stated, petitioners have made some erroneous statements and inferences to which these respondents must except. Generally, they may be classified as follows:

(a) Statements to the effect that there was no conflict of evidence on any material issue covered by the findings of the District Court (pages 5, 21, 34);

(b) Statements to the effect that the train porters have performed the disputed work under a contract with the railroad companies and under a custom and

practice made a part of that contract (pages 5, 6, 7, 10, 19, 20, 21, 33, 37);

(c) Statements to the effect that the train porters would lose their jobs if they ceased to perform the disputed work (pages 7, 12, 19, 21);

(d) Statements to the effect that the railroad companies desire to continue a contract, custom and practice which entitle train porters to perform the work in controversy (pages 6, 10, 11, 20, 33, 37);

(e) Statements to the effect that there is no dispute between the railroad companies and the train porters as to the meaning, application and effect of the contract between said companies and their train porters (pages 9, 10, 11, 20, 33, 36);

(f) Statement to the effect that the railroad companies agree that the train porters have performed the disputed work under a contract and under a custom and practice made a part of that contract (page 33).

In support of these statements the train porters cite Findings of Fact II, III*, VIII, and X which they prepared (R. 108-113) and the District Court adopted (R. 134).

The evidence does not support those portions of Findings of Fact II and III, cited on pages 5 and 19, which recite that the train porters have performed the work in controversy pursuant to contract and custom between the train porters and the railroad companies. Furthermore, such findings are erroneous because they imply that train porters exclusively have performed the disputed work, while the evidence shows that such work has been performed interchangeably by train porters, conductors, brakemen, and

* Incorrectly shown by petitioners as Finding XXIII (page 19).

other employees of respondents (R. 528-531, 537-540). Respondents excepted to the findings on those grounds (R. 139, 140).

Finding of Fact VIII does not support the statements on page 20. Furthermore, this finding is not supported by the evidence if it is construed to mean that the train porters are entitled to perform the disputed work under their contract with respondents, or that respondents admit that any such right exists.

Finding of Fact X, cited on page 21, does not support the inference that the train porters will lose their jobs if they cease to perform the work in controversy. Furthermore, the evidence does not support the finding that many porters would lose their jobs in that event.

POINTS PRESENTED

I.

The Circuit Court correctly ordered a dissolution of the temporary injunction against the respondent railroad companies.

II.

The Circuit Court correctly held that the respondent railroad companies had and have the legal right to terminate their contract with the train porters and to negotiate a new contract which expressly excludes the work in controversy.

III.

This case does not involve any dispute which can be taken by the train porters either to the National Railroad Adjustment Board or to the National Mediation Board.

IV.

The membership of the National Railroad Adjustment Board, if biased as claimed by petitioners, affords no reason for review by this Court.

V.

The Circuit Court erred, as did the District Court, in failing and refusing to require the train porters to give security in a sum sufficient to protect the railroad companies from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction.

ARGUMENT

Preliminary Statement

These factors influenced the decision of the railroad companies to withdraw the work in controversy from their train porters:

1. Four Awards of the First Division of the National Railroad Adjustment Board against the Southern Pacific, Texas and Pacific, and Santa Fe, holding:

(a) That similar work belongs to brakemen;

(b) That the use of train porters, in the performance of such work, is a violation of the seniority rights of brakemen;

(c) That the claims and complaint of the brakemen should be sustained (Exhibits W, X, Y and Z to Stipulation of Facts, not printed; R. 220, 223, 655; Exhibit W, pages 1-2, 18; Exhibit X, pages 1, 23; Exhibit Y, pages 1, 35; Exhibit Z, pages 1, 28).

2. The action of the First Division of the National Railroad Adjustment Board, by Referee James B. Riley, in sustaining against the Santa Fe money claims of four individual brakemen and claims "in all other instances of similar nature now on file" (Exhibit W, pages 1, 18).

3. The positive threat of the Brotherhood of Railroad Trainmen to file similar claims against these respondents if they continued to use train porters in performing the disputed work (R. 240-241, 207-209, 615).

4. The decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561*, in which it was held that the National Railroad Adjustment Board should construe the contracts of two opposing unions and decide which group of employees should perform the disputed work.

5. The holding of this Court that an award of the National Railroad Adjustment Board is more than an advisory opinion, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 720-721*, and the tendency of this Court to sustain an award of the Board upon a "factual question" which "is intricate and technical" because rendered by "an agency especially competent and specifically designated to deal with it", *Order of Railway Conductors v. Pitney, 326 U. S. 561, 567*.

6. The inability of these respondents to initiate an action testing the validity of an adverse award because the right of review, at the instigation of a railroad company, is not granted by the Railway Labor Act, *Washington Terminal Co. v. Boswell, 124 Fed. (2d) 235, 240;* affirmed by divided Court, *319 U. S. 732.*

7. The knowledge that the Brotherhood of Railroad Trainmen would resort to a strike vote to enforce an award against these respondents (R. 619), as it did in the Southern Pacific case (R. 617-618), instead of suing on the award as contemplated by the Railway Labor Act [45 U. S. C. A. Sec. 153(p)].

Argument Under Points I and II.

Point I—(Restated)

The Circuit Court correctly ordered a dissolution of the temporary injunction against the respondent railroad companies.

Point II—(Restated)

The Circuit Court correctly held that the respondent railroad companies had and have the legal right to terminate their contract with the train porters and to negotiate a new contract which expressly excludes the work in controversy.

Points I and II are related and will be considered together.

Neither the agreement between these respondents and their train porters (R. 229-234) nor the agreement be-

tween respondents and their brakemen (R. 252-295) specify who shall perform the work in controversy* although each group bases its claims upon those respective agreements. Therefore, having concluded to withdraw such work from the train porters, for the reasons stated in the foregoing preliminary statement, these respondents gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act [45 U. S. C. A. Sec. 152 Seventh and Sec. 156].

The Railway Labor Act is part of Title 45 of the United States Code Annotated. Section 152 Seventh of that Title reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title".

It is clear from this statute that the respondent railroad companies were authorized to withdraw the disputed work from the train porters, even though the right to such work were embodied in an agreement—which is denied, provided such withdrawal was made either in accordance with the train porters' agreement or in accordance with the provisions of Section 156 of Title 45.

The current agreement with the train porters became effective December 1, 1928 (R. 229). The second para-

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* The Circuit Court so found: "* * * neither the agreement between the railroad companies and the train porters, nor that between the railroad trainmen and the railroads, states in so many words that the railroads agree to give the work in question to either of the groups or both" [R. 700; 164 F. (2d) 7].

graph of Article XI of that agreement reads in part as follows:

> "These rules and regulations shall remain in full force and effect * * * until written fifteen (15) days' notice is served, setting forth any change that is desired by either the railway or employes, and a hearing will be given within fifteen (15) days after receipt of notice" (R. 233-234).

Section 156 of Title 45 of the Code reads as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board".

As heretofore stated, these respondents gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act.

By telegram dated April 12, 1946 (R. 241), these respondents notified T. D. McNeal, representative of the

train porters (R. 466-467), that the Brotherhood of Railroad Trainmen was protesting the use of train porters to perform the work in controversy. By letter dated April 15, 1946 (R. 242), respondents notified McNeal of their intention to cancel the train porters' agreement effective May 16, 1946, and to negotiate a new agreement. A conference was arranged for May 4, 1946 (R. 244) but postponed to and held on May 7, 1946 (R. 245, 246). No agreement was reached, the conference was adjourned, and the effective date for cancellation of the agreement was postponed (R. 246). Another conference was held on May 22, 1946, and adjourned to a later date to be mutually agreed upon (R. 248). The final conference was held on June 7, 1946 (R. 250). Verbally and by letter of that date, respondents notified the train porters that the agreement would be cancelled at midnight on June 30, 1946, and that respondents were willing to negotiate another agreement which would expressly exclude the work in controversy (R. 250-251). Services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

Having complied with the terms of the train porters' agreement (R. 233-234) and with the provisions of the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156) these respondents had the legal right to cancel the train porters' agreement at midnight on June 30, 1946, and thereafter to negotiate a new agreement with the train

porters which would expressly exclude the work in controversy. The Circuit Court so held:

> "The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698; *164 F. (2d) 5-6*].
>
> "The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; *164 F. (2d) 9*].

The porters do not challenge this right of respondents. They merely contend that the right should not be exercised because the action of respondents has been induced by the wrongful acts of the trainmen. This affords no basis for the temporary injunction against the railroad companies.

Argument Under Points III and IV.

Point III—(Restated)

This case does not involve any dispute which can be taken by the train porters either to the National Railroad Adjustment Board or to the National Mediation Board.

Point IV—(Restated)

The membership of the National Railroad Adjustment Board, if biased as claimed by petitioners, affords no reason for review by this Court.

Points III and IV are related and will be considered together.

For the reasons stated in the preceding argument under Points I and II, and as found by the Circuit Court, these respondents had the legal right to cancel their contract with the train porters and to negotiate a new contract which expressly excluded the work in controversy [R. 697-698, 705; *164 F. (2d) 5-6, 9*]. This being so, there is no dispute to be taken to the National Railroad Adjustment Board. The sole question, as between respondents and their porters, is whether or not respondents should be enjoined from exercising this right because their action has been induced by the alleged wrongful acts of the trainmen. This is purely a question of law which only the courts can answer. Power to answer it does not repose in the National Railroad Adjustment Board or in the National Mediation Board. The Circuit Court erred, therefore, in holding that "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; *164 F. (2d) 7*], and the Circuit Court erred in sending the parties to the National Railroad Adjustment Board under the doctrine announced by this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318* [R. 699-701; *164 F. (2d) 6-7*]. The *Pitney case*, as well as the Southern Pacific, Texas and Pacific, and Santa Fe cases before the Adjustment Board [Footnotes: R. 700; *164 F. (2d) 7*], merely involved the proper interpretation of conflicting agreements. In none of those cases, as in this case, had the railroad companies,

"after due notice and in accord with the provisions of the Railway Act" [R. 698; *164 F. (2d) 6*], sought to cancel one contract and to negotiate a new contract expressly eliminating the work in controversy. These facts distinguish the *Pitney case*, and the other cases, from the case at bar and show why there is no present dispute within the jurisdiction of the National Railroad Adjustment Board. This being so, it is immaterial whether or not the members of that Board are biased as alleged by the train porters and such allegations afford no reason for review by this Court.

Furthermore, there is no dispute or controversy which the train porters can take to the National Mediation Board. As shown in the preceding argument under Points I and II, respondents sought to cancel the agreement with their train porters and to negotiate a new agreement expressly excluding the work in controversy both "in the manner prescribed in such agreement" and under Section 156 of Title 45—the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh). Changes made as provided in an agreement are not subject to review by the National Mediation Board, and proposed changes under Section 156 may be made at the expiration of ten days from the termination of conferences, if there has been no request for or proffer of the services of the Mediation Board. In the instant case, services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560). It follows that the train porters have no right to resort to the National Mediation Board.

Argument Under Point V.

Point V—(Restated)

The Circuit Court erred, as did the District Court, in failing and refusing to require the train porters to give security in a sum sufficient to protect the railroad companies from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction.

The insufficiency of the temporary restraining order bond and the temporary injunction bond was urged before the Circuit Court in Points 3, 4, 5 and 6 reading as follows:

> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".
>
> "4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".
>
> "5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction".

The Circuit Court did not pass upon these points. Except to state that respondents complained of the terms upon which the temporary injunction was issued [R. 704; *164 F. (2d) 9*], that Court made no reference to the inadequacy of the temporary restraining order bond and the temporary injunction bond. The Court, however, did make this general observation:

"* * * the temporary injunction, insofar as it runs against the railroads, was induced solely by the court's conclusion that the trainmen were guilty of past and threatened tortious conduct, wrongfully coercing the railroads into their proposed action, which it considered enjoinable. It is clear from the record that no injunction would have been issued against the railroads except upon that consideration and such was the theory of the plaintiffs' case as against the railroads" [R. 704-705; *164 F. (2d) 9*].

Regardless of the reason for the temporary restraining order and the temporary injunction against these respondents, they were and are entitled to the protection contemplated by Rule 65(c) of the Federal Rules of Civil Procedure. This has been denied them in the instant case.

Had the temporary restraining order and the temporary injunction not been issued, these respondents, at midnight on June 30, 1946, would have discontinued using train porters to perform the work in controversy (R. 250). Be-

cause of the temporary restraining order and temporary injunction, respondents have continued to permit train porters, as well as other employees, to do such work. Claims of the brakemen are accruing on each day that train porters perform the disputed work (R. 240-241, 208-209).

Amount of Potential Damage

The evidence as to the amount of respondents' potential liability is undisputed.

By letter dated April 1, 1946, the Brotherhood of Railroad Trainmen threatened to commence the filing of claims on behalf of individual brakemen if the railroad defendants did not, within ten days, discontinue using employees other than brakemen in the performance of the work in controversy (R. 239, 240-241).

Between April 11, 1946, and June 24, 1946, when this suit was filed and the temporary restraining order was issued (R. 16, 19), 688 claims totaling $6,447.00 had been filed against the railroad defendants (R. 540) and their potential liability for that period was $38,617.50 (R. 542).

A hearing was held on September 14, 1946 (R. 200) on the motion of the railroad defendants to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). According to the undisputed evidence, claims of the brakemen against the railroad defendants were then accruing at an approximate rate of $520.00 per day (R. 201). Subsequent to the hearing and before the Court ruled on the motion, a check of operations was made during the month of October 1946. It revealed that the claims of the brakemen were accruing

at the rate of $514.90 per day (R. 73). An affidavit to that effect by A. F. Winkel, an officer for the railroad defendants (R. 72), was filed on November 16, 1946 (R. 73), fourteen days before the Court on November 30, 1946 (R. 75) overruled the railroads' motion to increase the amount of the temporary restraining order bond. As of that date, the claims accruing since July 1, 1946, totaled $78,779.70.

Mr. Winkel was a witness at the hearing on plaintiffs' application for a temporary injunction on January 22, 1947 (R. 543). He testified that the railroad defendants were being subjected to a daily potential liability of $514.90 (R. 542). At that rate, said claims totaled $127,695.20 for the period July 1, 1946, to March 5, 1947, when the temporary injunction was issued upon plaintiffs' giving a $500.00 bond (R. 160-163), and they totaled $140,052.80 when the Court on March 29, 1947, overruled the motion of the railroad defendants to increase the amount of the temporary injunction bond (R. 183).

As a result of the issuance of the temporary restraining order and temporary injunction, the potential liability of the railroad defendants will amount to $329,536.00 on March 31, 1948, and such potential liability thereafter will increase at the rate of $514.90 per day (R. 542).

Damages May Be Incurred or Suffered by Respondents

In resisting an adequate bond in the Circuit Court, the train porters asserted that the claims of the brakemen are "fantastic" and "ridiculous" and that respondents "have full opportunity for judicial review of any order made

by the Adjustment Board" (Train Porters' Brief, pages 58-59). Unfortunately, the National Railroad Adjustment Board and the Courts do not share these views.

As above stated, the First Division of the National Railroad Adjustment Board, in four Awards against the Southern Pacific, Texas and Pacific, and Santa Fe, has held (a) that work similar to that now in controversy belongs to brakemen, (b) that the use of train porters in the performance of such work is a violation of the seniority rights of brakemen, and (c) that the claims and complaint of the brakemen should be sustained (Exhibits W, X, Y and Z to Stipulation of Facts, not printed; R. 220, 223, 655; Exhibit W, pages 1-2, 18; Exhibit X, pages 1, 23; Exhibit Y, pages 1, 35; Exhibit Z, pages 1, 28). And in one of those Awards (Exhibit W) the Board, by its labor members and Referee James B. Riley, sustained against the Santa Fe money claims of four individual brakemen and claims "in all other instances of similar nature now on file" (Exhibit W, pages 1, 18). The claims against the Santa Fe in that case were as "fantastic" and as "ridiculous" as the claims which the brakemen have asserted and will assert against respondents but that did not deter the Referee and the labor members of the Board. Acting for the Board, as a majority, those gentlemen entered an Award sustaining a claim for each of five men in excess of 300 miles, or a day's pay, because each of them on only one occasion handled the switches and gave the signals necessary to place their respective trains in side tracks (Exhibit W, pages 2, 18). In addition, as above stated, the Board in that Award likewise sustained the claim "that

like settlement shall be made in all instances of similar nature now on file" (page 18). In view of that Award, it is more than idle for the train porters to brand as "fantastic" the claims filed and which will be filed against respondents, and for the train porters to term "ridiculous" the idea that respondents "would have to pay a full day's wage to a Trainman, who was not there, because a Porter threw a switch on a designated run" (Train Porters' Brief, page 58).

But, declared the train porters, respondents "have full opportunity for judicial review of any order made by the Adjustment Board, with respect to any of these claims" (Train Porters' Brief, pages 58-59). This statement is not supported by the decisions.

The Railway Labor Act provides that the division of the Adjustment Board which makes an Award in favor of a petitioner,—

> "shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named" [45 U. S. C. A. Sec. 153(o)].

The Act also provides that if the carrier does not comply with said order, "the petitioner, or any person for whose benefit such order was made" may file suit to enforce the same, in which event the findings and order of the division of the Adjustment Board "shall be prima facie evidence of the facts therein stated" [45 U. S. C. A. Sec. 153(p)]. Construing this statutory provision, the United

States Circuit Court of Appeals for the District of Columbia by Associate Justice Rutledge, who is now an Associate Justice of this Court, declared that "The Act permits, but does not require, the employee to bring an enforcement suit", *Washington Terminal Co. v. Boswell, 124 F. (2d) 235, 242, footnote 13;* affirmed by divided Court, *319 U. S. 732.* This holding was made despite the argument of the Terminal Company that its employees would "elect not to institute enforcement suits, but to rely upon their economic bargaining power, that is, the right to strike, to secure enforcement or acceptance of awards" and that thereby the Terminal Company would be "deprived of its day of defense, and so of its only day in Court" [*124 F. (2d) 246*]. In disposing of this phase of the case, the Circuit Court pointed out that this was an "unsupported and argumentative assertion" (page 246), but concluded:

> "Finally, even if the argument were more persuasive factually, it is hardly sufficient to establish the unconstitutionality of the legislation. The Railway Labor Act was designed, not to outlaw the right to strike, but merely to prevent the necessity for its exercise. That it has done, as the results attest. The argument assumes that a strike, or threat of one, to secure acceptance of an award would be unlawful. That it would be so has not been established, and the question need not now be determined. Whether such action would be lawful or unlawful, the mere possibility that employees may resort to it rather than to suit is not enough to make the latter inadequate constitutionally as protection for the carrier's rights. The weight of that possibility is properly within the discretion of Congress in determining whether the initiative in litigation shall be given to one party or the other, particularly where as here it has given no final or conclusive effect, as against the party put upon

> the defensive, to the cause of action to be asserted. The fact that one party to a dispute which is litigable may undertake to settle it illegally does not render a legal remedy, adequate within itself, inadequate [*124 F. (2d) 247*].

This opinion may explain why the Brotherhood of Railroad Trainmen was emboldened to resort to a strike vote on the Southern Pacific to enforce the above mentioned Awards against that Company (R. 617-618, Exhibit X and Y to Stipulation of Facts, not printed; R. 220, 223, 655), and why the witness for the Brotherhood of Railroad Trainmen in this case frankly admitted that the Brotherhood would resort to a strike vote against respondents to enforce any Award which might be rendered against them (R. 619).

The Circuit Court in the *Terminal Company case* went further. It declared that the method of review provided in the Railway Labor Act "was intended to be exclusive" [*124 F. (2d) 240*]; it would not permit the Terminal Company to test the validity of the Award by declaratory judgment (page 251); and it announced the principle that "a carrier, consistently with the Railway Labor Act", cannot "maintain a suit in equity to set aside an Award or enjoin its enforcement" (page 251).

It is obvious from the foregoing that respondents do not have, as contended by the train porters, "full opportunity for judicial review of any order made by the Adjustment Board, with respect to any of these claims" (Train Porters' Brief, page 59). But suppose they did. What

chance would respondents have to set aside the order? Again we quote from the *Terminal Company case:*

> "The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony" [*124 F. (2d) 241*].

These quotations from the *Terminal Company case* show the difficulty, if not impossibility, of setting aside an award or order of the National Railroad Adjustment Board. Furthermore, if court review were possible, the chances of overturning an award or order would be ex-

tremely remote because this Court has held that an Award of the Board is more than an advisory opinion, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 720-721,* and because of the tendency of this Court to sustain an Award of the Board upon a "factual question" which "is intricate and technical" because rendered by "an agency especially competent and specifically designated to deal with it", *Order of Railway Conductors v. Pitney, 326 U. S. 561, 567.*

It is clear from the foregoing that the possibility of respondents being required to pay the claims which have been filed and which will be filed against them by the brakemen is neither speculative nor remote. On the contrary, the District Court found that such damages "might and doubtless will accrue to the corporate defendants" (R. 639). This being so, the District Court and the Circuit Court erred in failing or refusing to require the train porters to give respondents security for the payment of such damages, which approximate $514.90 per day for each day since June 30, 1946 (R. 73, 542), the date on which respondents would have discontinued using train porters in the performance of the work in controversy except for the temporary restraining order and temporary injunction which have been issued in this case.

WHEREFORE, if said petition for a writ of certiorari be granted, respondents pray that the Court affirm the judgment of the Circuit Court which ordered a dissolution of the temporary injunction against these respondents; that the Court declare that there is no dispute between respondents and their train porters which can be taken either to the National Railroad Adjustment Board

or to the National Mediation Board; that the Court overrule the action of the District Court and of the Circuit Court in refusing and failing to require the train porters to give adequate security as required by Rule 65(c) of the Federal Rules of Civil Procedure; that the Court enter an order requiring the train porters to give such security; and for all other and further relief to which respondents may be entitled.

Dated March 24, 1948.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 661.

A. PHILLIP RANDOLPH ET AL., PETITIONERS,

VS.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS.

BRIEF OF RESPONDENTS R. D. WOOD, ROY ELLIOTT LANG, JOHN WILLIAM DEARING AND HOLLIS ORVAL THOMPSON AND BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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JURISDICTION.

The Petition for Writ of Certiorari states that the jurisdiction of this court is invoked under Title 29, Section 344, Judicial Code as Amended, Section 237 (Petition p. 2).

Section 344 appears to relate to "Appellate jurisdiction of decrees of State courts; certiorari" Title 28, U. S. C. A., Sec. 344 (Judicial Code, Section 237 amended). The judgment, decision or decree complained of by Petitioners in this case has been rendered by the United States Circuit Court of Appeals for the Eighth Circuit (R. 695-705, 164 F. 2d 4). We therefore do not understand that this court has jurisdiction under the aforementioned Section 344.

PETITIONERS' SUMMARY STATEMENT OF MATTER INVOLVED AND OF ESSENTIAL FACTS.

For the most part the statement of matter involved and of essential facts in the Petition consists of a resume' of the findings of fact and declarations of law adopted by the District Court and is so replete with self-serving interpretive statements that we must insist that no fair statement of the matter involved is presented in the Petition. Therefore, in order to apprise this court of the nature of this case and the real issues inherent in the record we are compelled to make a complete statement of the case.

I.

STATEMENT OF THE CASE.

The controversy in this suit involves a dispute between the Petitioners (Porters) and these Respondents (Trainmen) regarding the right to do certain work on the lines of the Respondents Missouri-Kansas-Texas Railroad and Missouri-Kansas-Texas Railroad of Texas (Carrier).

The Services in Controversy (hereinafter referred to by that title) are:

(1) Inspection of cars and trains and the testing of signal and brake apparatus for safety of train movement.

(2) The use of hand and lamp signals for the protection and movement of trains and engines, including necessary flag protection on the head end of trains or through blocks.

(3) Opening and closing switches and derails for switching and for the movement of trains and engines enroute around wyes and at some terminals.

(4) Coupling and uncoupling cars and engines and the hose and chain attachments thereof enroute and at some passenger terminals.

(5) Pick up, set out, place and switch loaded and unoccupied passenger cars enroute and at some passenger terminals.

(6) Read the Conductor's train orders and familiarize himself with them to determine where opposing trains are to be met or passed and observe position of train order signals and see that train orders affecting the movement of trains are picked up enroute (Footnote to Opinion, R. 697, 698).

The Services in Controversy constitute a part of the duties of Passenger Train Brakemen and are and for a long period of years have been performed by Brakemen on the lines of the Carrier. Such duties are included in Brakemen's Services generally on all railroads in the country (R. 582-585).

The petitioners are Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants, an International Unincorporated Labor Union affiliated with the American Federation of Labor, and Local Train Porters Union No. 3 and officers and members of said

unions. Petitioners claim to represent all of that class of persons on the Carrier known as Train Porters, who will hereafter be referred to as Porters. The International Union is the representative of the Porters as to their collective bargaining and other rights under the Railway Labor Act (Title 45, U. S. C. A., Secs. 151 *et seq.*, R. 1, 3, 467, 517, 518).

These respondents R. D. Wood, Roy Elliott Lang, John William Dearing, and Hollis Orval Thompson are officers and members of the respondent Brotherhood of Railroad Trainmen. The respondent Brotherhood of Railroad Trainmen, hereinafter sometimes referred to as Brotherhood, is an International Unincorporated Labor Union and represents the Trainmen class or craft including Brakemen with respect to their collective bargaining and other rights with the Carrier under the Railway Labor Act. The Trainmen class will sometimes be referred to herein as Trainmen or Brakemen (R. 3, 580).

The respondents Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas are the Carrier on whose lines the members of the Porter class and Trainmen class affected by this litigation are employed (R. 3).

Pleadings.

The Porters instituted this action in the United States District Court for the Western District, Western Division of Missouri, by a verified complaint supported by affidavits filed June 24, 1946 (R. 2-16). Upon the filing of the verified complaint and an *ex parte* hearing held without notice to any of the respondents the district judge issued a temporary restraining order (R. 16-18).

The complaint alleges this is a class action and among other things that the rights being claimed by the Porters

spring from a contract as well as long established and agreed custom between the Porters and the Carrier. The wrong charged against the Carrier is the threat by the Carrier to cancel the contract and custom between the Porters and Carrier (R. 3, 4, 5).

The wrong charged against the Brotherhood is an alleged unlawful and tortious interference and threat on its part to interfere with the claimed rights of the Porters under the alleged contract and custom with the Carrier by the exercise of fraud, duress, threats, and undue influence upon the Carrier with the intent to induce the Carrier to violate the alleged custom and alleged contract (R. 5).

The complaint alleges that among the duties of Porters on the Carrier lines are loading and unloading passengers, looking after their comfort, assisting with their luggage, and other duties not having directly to do with the movement of trains, and in addition thereto duties directly connected with the movement of trains, which duties are said to be the Services in Controversy (R. 5, 6).

The complaint alleges that the Porters have their own seniority rights which are not limited by the seniority rights of Trainmen, and that Porters have no rights as Trainmen either as to seniority or otherwise, because the Porters, being Negroes, are not permitted to belong to the Brotherhood (R. 6).

The complaint also alleges that the Carrier and the Train Porters entered into a written contract on December 3, 1928, fixing wages, working conditions, etc. (R. 8).

By way of amplification of the charge against the Brotherhood the complaint alleges that the fraud, duress, threats and undue influence of the Brotherhood against the Carrier consisted of (1) that unless the Carrier took from the Porters the performance of the Services in Controversy, the Brotherhood would make claims against it by various proceedings in and out of court and (2) that it

was impossible for the Carrier to comply with the Brotherhood's demands without breaching its contract and custom with the Porters and (3) if the threat of the Brotherhood was carried out many claims and suits would be filed which would be burdensome to the Carrier and hence place the Carrier in a dilemma as to whether it should abide by the contract and custom between it and the Porters or breach the same and comply with the demands of the Brotherhood, and (4) that said threats by the Brotherhood, both written and oral, culminated in a writing of April 1, 1946, expressly demanding that the work be taken from the Porters and given to the Brotherhood (R. 10, 11).

On June 7, 1946, the Carrier notified the Porters that because of the demands of the Brotherhood, the contract between the Carrier and the Porters would be cancelled, effective June 30, 1946 (R. 11, 12).

The complaint then avers that unless the Carrier is restrained it will carry out its threat to cancel the contract and custom and comply with the demands of the Brotherhood and unless the Brotherhood is restrained it will carry out its threats and continue to bring pressure on the Carrier (R. 12).

The Complaint alleges that the Porters have no administrative or statutory remedies to maintain the *status quo* of their jobs and that the Railway Labor Act and other administrative acts provide the Porters no remedies (R. 12).

The prayer of the complaint among other things originally sought a declaration of the rights of the parties, but this portion of the prayer was later stricken on motion of the Petitioners (R. 13, 74).

By way of further relief the prayer requests the court of equity to enjoin the Carrier from violating and cancelling the contract with the Porters and to enjoin the Broth-

erhood from seeking to enforce the demands of the Trainmen against the Carrier (R. 13, 14).

The temporary restraining order issued by the District Court followed the prayer of the complaint (R. 16, 17, 18).

On July 15, 1946, the Brotherhood filed a motion to dissolve or vacate the temporary restraining order on the grounds (1) that petitioners were not entitled to injunctive relief under the terms of the Norris-LaGuardia Act, Title 29, U. S. C. A., Sec. 108, and (2) that the court had no jurisdiction of the subject matter under the provisions of the Railway Labor Act, Title 45, U. S. C. A., Sec. 151, *et seq.* (R. 20, 21).

Also on July 15, 1946, the Brotherhood filed a motion to dismiss the complaint on the ground that the District Court had no jurisdiction of the subject matter and at the same time a similar motion to dismiss was filed on behalf of the individual respondents (R. 33, 34).

Subsequently, a motion to stay proceedings was substituted by the Brotherhood for the motion to dismiss the complaint (R. 69-71).

All motions were overruled by the District Court on November 30, 1946 (R. 74-76), and on January 20, 1947, these respondents filed their amended answer on which the issues were joined and in which all motions to dismiss and pleas to the jurisdiction of the court were renewed (R. 94-106).

Chronological Order of Factual Events Leading to Suit.

At various times between 1939 and 1946 the General Chairman of the Brotherhood of the Carrier Lines discussed the claim of the Brotherhood that Brakemen were entitled to perform the Services in Controversy with representatives of the Carrier (R. 593, 594) and in that con-

nection, the disputes and claims filed by the Brotherhood on the Southern Pacific Railroad (R. 592, 594) involving the same Services in Controversy. After the awards of the First Division of the National Railroad Adjustment Board in the Southern Pacific case, award No. 5906 (Exhibit X, R. 511) and No. 5907 (Exhibit Y, R. 503) which were later followed by an award on the Texas and Pacific Railroad, award No. 7251 (Exhibit Z, R. 505), the General Chairman of the Brotherhood discussed informally those awards with the Carrier's representative and said he would not file any formal protest against the Carrier until some definite disposition had been made of the cases on the Southern Pacific and the Texas and Pacific Railroad (R. 594). The disputes on the Southern Pacific were settled in January of 1946 and thereafter the General Chairman of the Brotherhood in the conversation which he had with the Carrier's representative called attention to the settlement and suggested that the Carrier and the Brotherhood try to work out some settlement similar to the settlement in the Southern Pacific case without the necessity of the Brotherhood filing time claims against the Carrier and taking them to the Adjustment Board (R. 594, 595). The Carrier's representative told the General Chairman that he would give consideration to the matter. Following this the General Chairman on February 27, 1947, wrote a letter to the Carrier's representative (Exhibit 23, R. 610) asking for a conference on the question of employees other than those holding seniority as Brakemen performing Brakemen's duties, *viz.*, Services in Controversy on passenger trains. He received no reply from the Carrier's representative in regard to the matter (R. 595). The General Chairman then wrote the letter of April 1, 1946, addressed to the Carrier's representative (Exhibit M, R. 239-241) formally protesting the performance of Brakemen's duties on passenger trains by employees other than

Brakemen and enumerated among such duties the Services in Controversy. The letter concludes:

> "Unless the practice of requiring or permitting these employees to perform Brakemen's duties is discontinued within ten days from date of this letter, claim will be filed for each available Brakeman on M-K-T Lines first out on extra board at time such train is run, on which this service is performed by other than a qualified Brakeman, on the same basis as though such Brakeman was used to perform all of the Brakemen's duties and work on such passenger trains" (R. 240, 241).

On April 12, 1946, the Carrier's representative wired the General Chairman (Exhibit 21, R. 609) inquiring if the Brotherhood would be willing to consolidate the seniority list of Brakemen with that of the Porters and on the same date the General Chairman replied by wire (Exhibit 22, R. 609) that the Brotherhood would not be willing to do so. On the same date the Carrier's representative wired the International Field Organizer of the Porters (Exhibit N, R. 241) asking whether the Porters would be willing to consolidate the seniority list of the Porters with that of the Brakemen, to which request he received a telephone reply that the Porters would not be willing to do so (R. 473).

The Carrier's representative then wrote a letter to the Porters' representative (Exhibit O, R. 242) dated April 15, 1946, formally notifying the Porters of the Carrier's intention to discontinue the performance of the Services in Controversy by Porters effective May 16, 1946, and to cancel the current collective bargaining contract between the Porters and the Carrier and to negotiate a new agreement. On the same date the Carrier's representative wrote the Brotherhood's representative (Exhibit 20, R. 607) replying to Exhibit M (R. 239-241) pointing out that it would be

necessary for the Carrier to cancel the existing agreement between the Porters and the Carrier and further that because the Brotherhood had refused to consolidate its seniority list with that of the Porters and because of decisions of the Adjustment Board on other railroads the Carrier was giving the required notice to the Porters of cancellation of the Porters' agreement effective May 16, and also advised that the time claims of the Trainmen referred to in Exhibit M (R. 239-241) were declined.

On April 17, 1946, the Porters, through their International representative wrote the Carrier's representative (Exhibit P, R. 243, 244) acknowledging receipt of the Carrier's notice of cancellation (Exhibit O, R. 242) and set the time and place for conference on the notice. On the same day the Brotherhood's representative wrote the Carrier (Exhibit 24, R. 611) acknowledging receipt of the Carrier's letter (Exhibit 20, R. 607) pointing out that the Brotherhood's letter of April 1, 1946 (Exhibit M, R. 239-241), is a protest against employees other than those referred to in Article 68 (Article 58) of the Trainmen's Agreement (R. 295) performing Trainmen's service on passenger trains and is a request for a proper application of current rules, and further advising that time claims submitted after April 10, 1946, on account of violations of the current agreement of the Brotherhood and the Carrier will be handled in the usual manner of appeals.

Pursuant to the Carrier's notice of cancellation to the Porters and the Porters' reply thereto (Exhibit O, R. 242) the first conference between the Porters and the Carrier was held on May 7, 1946. The Porters were represented by the International Field Organizer, the International President, the First International Vice-President of the Porters' Union, and the General Chairman of the Porters on the Carrier Lines. The Assistant General Manager (R. 532) of the Carrier and the Carrier's attorney appeared for

the Carrier (R. 475). A discussion was had concerning the reasons for the notice of cancellation. The Carrier's representative showed the Porters the Brotherhood's formal notice (Exhibit M, R. 239-241, R. 476) and told the Porters that just before this conference a situation had developed on the St. Louis and San Francisco lines in which there was a threatened strike by the Trainmen and one of the reasons for it was the performance by Train Porters of the Services in Controversy (R. 476, 477). He called attention to the economic strength of the Brotherhood and also to the decisions of the First Division of the National Railroad Adjustment Board involving disputes over similar work on the Santa Fe, Southern Pacific, and Texas and Pacific, and remarked that in view of these decisions it was felt almost certain that the same Board would decide the same way against the Carrier on the time claims filed by the Brotherhood (R. 477). There was discussion about taking the dispute between the Porters and the Carrier to the National Mediation Board (R. 479) and also about taking the matter to the National Railroad Adjustment Board (R. 480). The Carrier's representative summed up the situation by saying that even though the Carrier desired to continue employing the Porters it had no other way than to cancel the agreement, in view of the pressure being exercised by the Brotherhood (R. 477), and that the Carrier felt it necessary to negotiate a new agreement with the Porters which would exclude the Services in Controversy (R. 446, 447). The Porters asked the Carrier's representative to postpone the effective date of the notice to permit them time to employ a lawyer (R. 446, 447, 481). The conference terminated in the Carrier's representative's letter to the Porters dated May 7, 1946 (Exhibit R, R. 246), which referred to the conference and to the Carrier's notice of April 15 (Exhibit O, R. 242) and

advised that since no agreement had been reached the effective date of said notice was being postponed.

On May 13, 1946, the Carrier's representative wrote the Brotherhood's General Chairman (Exhibit 25, R. 612, 613) advising that the handling of the matter under the Railway Labor Act not having been completed, the effective date of the discontinuance of the performance of the Services in Controversy by the Porters had been postponed. In reply the General Chairman of the Brotherhood wrote (Exhibit 26, R. 613, 614) and reiterated the Brotherhood's position set forth in his letter of April 1 (Exhibit M, R. 239-241).

On May 22 another conference between the Porters and the Carrier was held which culminated in a letter from the Carrier to the Porters (Exhibit T, R. 248) noting that agreement had not been reached on the notice of cancellation of the contract and that a later conference was to be arranged. The last conference between the Porters and the Carrier was held June 7 (R. 475). The Porters' attorney attended and was their spokesman (R. 481, 482) and the whole matter was rediscussed and re-explored with emphasis on the legal phases (R. 482). This conference ended with a letter being written by the Carrier to the Porters (Exhibit V, R. 250, 251) notifying the Porters that cancellation of the contract (Exhibit I, R. 229) would be effective June 30, 1946.

Further Evidentiary Facts.

Although the representatives of the Porters in the conferences with the Carrier understood that the purpose of the Carrier was to cancel the current Porters' Agreement and negotiate another agreement in which the Services in Controversy would be excluded from the work to be performed by Porters (R. 487), neither the Petitioners' Union nor any of the Petitioner members of the Porter class took

any steps under the provisions of the Railway Labor Act to go to the National Mediation Board (R. 479, 480, 493) or to the National Railroad Adjustment Board (R. 480, 494), although the right to do so was recognized (R. 492, 493, 494).

Also in the discussion of the awards of the First Division of the National Railroad Adjustment Board (Exhibit Y, R. 502, 503; Exhibit Z, R. 504, 505; Exhibit W, R. 507, 509; Exhibit X, R. 510, 511) involving other railroads the Porters' representatives had knowledge of all of those awards and had them in mind at the time of the discussions (R. 514).

The Porters' representatives likewise knew that the Brakemen took their disputes to Division 1 of the Adjustment Board (R. 480) and that the Train Porters took their disputes to Division 4 of the Adjustment Board (R. 480, 520).

Exhibit H (R. 225) was the first collective bargaining contract between the Porters and the Carrier and was in force from July 1, 1921, until 1928 (R. 357). Exhibit I (R. 229) is the current contract and superseded Exhibit H and became effective December 1, 1928 (R. 364). Exhibit I has been amended several times, as shown by Exhibit J (R. 234), Exhibit K (R. 235), and Exhibit L (R. 237).

During Federal control of railroads in 1918 and 1919 when Train Porters performed the duties of Brakemen, such as inspecting cars, opening and closing switches, etc., Porters were paid the Brakemen's wage scale, which was higher than the Porter's scale (R. 359). After the termination of Federal administration of the railroads in 1921 the wages of Train Porters were reduced by bulletin (R. 426, 427).

There are 66 Porters on the Carrier (R. 414). Members of the Porter class have performed some of the Serv-

ices in Controversy for over 30 years (R. 313-379, R. 380-412, R. 413-454, R. 455-463).

The Mediation Board did not proffer its services in this controversy between the Porters and the Carrier (R. 544), and neither the Porters nor the Carrier requested the services of the Mediation Board under the provisions of the Railway Labor Act, and the Mediation Board had no knowledge of the pendency of the dispute regarding the Carrier's attempted cancellation of the Porters' contract (R. 560).

No Porter holds seniority as a Brakeman nor is any Porter paid under the Brakemen's Agreement (R. 355, 356, 485, 486, 553, 554). There was no agreement at any time between the Carrier and the Porters wherein the Carrier specifically agreed to assign to Porters the Services in Controversy (R. 562).

The duties of passenger train Brakemen on the Carrier include the Services in Controversy (R. 583, 584) and have been performed by Brakemen on the Carrier lines since 1911, and are included in Brakemen's services generally on all railroads in the country (R. 585).

The Trainmen, at least since 1918, have protested to the Carrier the performance of the Services in Controversy by employees of the Carrier other than Brakemen (R. 625-630, R. 590, 591, 592, 593).

The Brotherhood did not suggest or demand at any time that the Carrier cancel any existing agreement with the Porters (R. 604) nor did the Brotherhood either insist or desire that Porters be removed from any of the Carrier lines (R. 604). The Brotherhood did not insinuate the threat of a strike in the event the Carrier refused to accede to the Brotherhood's request that the Brakemen's services (Services in Controversy) be assigned to Brakemen (R. 615). The Brotherhood contemplated, and but for the restraining order would have

listed its time claims for a conference with the Carrier management and handled those claims with the Carrier in conferences and if the Carrier declined to pay the claims it would then have asked the Carrier to join in submitting the claims to the First Division of the National Railroad Adjustment Board and had the Carrier refused to so join it would have submitted the claims to the Board *ex parte* under the provisions of the Railway Labor Act and if not restrained it is still the intention of the Brotherhood to so advantage itself of the remedies provided by the terms of the Railway Labor Act (R. 615).

The Petitioners' suit herein was filed June 24, 1946, six days prior to June 30, 1946.

Present Status of the Brotherhood's Time Claims Against Carrier.

Since June 24, 1946, the Brotherhood and the Trainmen or Brakemen members of the class represented by it, have by virtue of the District Court's temporary restraining order (R. 16-18) and temporary injunction (R. 160-163) been restrained from pursuing their lawful remedies against the Carrier which are vouchsafed to them by Congress under the Railway Labor Act.

SUMMARY OF ARGUMENT.

POINT A.

This case involves a labor dispute within the meaning of the Norris-LaGuardia Act, Title 29, U. S. C. A., Section 101 et seq. and, therefore, the judgment of the United States Circuit Court of Appeals remanding the cause to the district court with instructions to dissolve the temporary injunction is unquestionably correct. The Petitioners do not, either in the Petition or the supporting brief, challenge this ruling. The Petition should therefore be denied.

Norris-LaGuardia Act, Title 29, U. S. C. A., Sec. 101, *et seq.*

Order of Railway Conductors of America v. *Pitney et al.*, 326 U. S. 561, 66 S. Ct. 322.

Order of Railroad Telegraphers v. *New Orleans, Texas and Mexico Ry. Co.*, 156 F. 2d 1, Cert. Den. 329 U. S. 758, 67 S. Ct. 112.

Railway Labor Act, Title 45, U. S. C. A., Sec. 151, *et seq.*

Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, v. *Toledo, P. & W. R. R.*, 321 U. S. 50, 64 S. Ct. 413, 414, 416, 417, 418, 420.

United States v. *Hutchison*, 312 U. S. 219, 234, 61 S. Ct. 463, 467.

Cole et al. v. *Atlanta Terminal et al.*, 16 F. Supp. 131, 133.

POINT B.

Questions I, II and III in the Petition do not present any question arising on the record in this case because as shown by the pleadings and the evidence, the controversies between the Petitioners and the Carrier and between these respondents and the carrier are under the applicable law as announced by this and other courts justiciable solely under the provisions of the Railway Labor Act and by the boards and tribunals provided for in the act.

Order of Railway Conductors of America v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322.

Switchmen's Union of North America v. *National Mediation Board*, 320 U. S. 297, 64 S. Ct. 95.

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas R. R. v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 64 S. Ct. 146.

General Committee of Adjustment of Brotherhood of Locomotive Firemen and Engineers v. *Southern Pac. Co. et al.*, 320 U. S. 338, 64 S. Ct. 142.

Order of Railroad Telegraphers v. *New Orleans, Texas and Mexico Ry. Co. et al.*, 156 F. 2d 1 (cert. den. 329 U. S. 758, 67 S. Ct. 112).

Brotherhood of Railroad Trainmen v. *Texas & P. Ry. Co.*, 159 F. 2d 822 (cert. den. 68 S. Ct. 62, rehearing den. 68 S. Ct. 149).

Steele v. *Louisville and N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226.

Tunstall v. *Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76 et al.*, 323 U. S. 210, 65 S. Ct. 235.

Moore v. *Illinois Central Railroad Co.*, 312 U. S. 630, 61 S. Ct. 754.

Gaskill v. *Roth*, 151 F. 2d 366 (cert. den. 327 U. S. 798, 66 S. Ct. 896, rehearing den. 328 U. S. 876, 66 S. Ct. 975).

Washington Terminal Co. v. *Boswell*, 124 F. 2d 235.

Southern Ry. Co. v. *Order of Railway Conductors*, 63 F. Supp. 306.

POINT C.

Question IV presented in the petition does not arise on the record in this case. Whether one union goes to Division One of the Adjustment Board, whereas another union goes to Division Four of the Adjustment Board for a determination of their respective disputes with the carrier is of no consequence. The Railway Labor Act affords a full, complete and adequate remedy for the disputants in each instance.

Railway Labor Act, Title 45, U. S. C. A. 151 *et seq.*

Order of Railway Conductors of America v. *Pitney*, *supra*, 326 U. S. 561, 567, 66 S. Ct. 322, 325.

Mellon Co. v. *Charles McCafferty*, 239 U. S. 134, 36 S. Ct. 94, 95.

Myers v. *Bethlehem Ship Building Corporation*, 303 U. S. 41, 50, 51, 52, 58 S. Ct. 459, 463, 464.

Kansas City Southern Railway Co. v. *Cornish et al.*, 65 F. 2d 671.

30 C. J. S., Sec. 26, p. 353.

POINT D.

Questions V and VI presented in the Petition do not arise on the record in this case because the facts pleaded and all the facts shown in evidence show that these respondents were not guilty of a common law tort.

17 C. J. S., Sec. 172, p. 532.

Restatement of Law of Torts, Section 773, page 87.

National Labor Relations Board v. *Karp Metal Products Co., Inc.*, 134 F. 2d 954, 955.

Portland Hotel Corporation v. *Fidelity Storage Corporation*, 132 F. 2d 57.

In re Prima Co., 98 F. 2d 952, 965.

Orr v. *Mutual Benefit Health & Accident Association*, 207 S. W. 2d 511, 515.

POINT E.

Question VII presented in the Petition does not arise on the record in this case for the reason that in this case there is absolutely no issue whatever as to racial discrimination of any kind or as to whether the porters, whose membership is negro, have or can have a fair hearing before either the Adjustment Board or the Mediation Board.

Cook v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810, 814.

Hill v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159.

Patton v. *Mississippi*, 68 S. Ct. 184.

Steele v. *Louisville and N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226.

Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450, 463, 464, 65 S. Ct. 1384, 1390, 1391.

Coffman v. *Breeze Corporations*, 323 U. S. 316, 324, 325, 65 S. Ct. 298, 303.

POINT F.

Discussion of reasons VIII and IX of Petitioners' supporting brief.

ARGUMENT.

POINT A.

This case involves a labor dispute within the meaning of the Norris-LaGuardia Act, Title 29, U. S. C. A., Section 101 et seq. and, therefore, the judgment of the United States Circuit Court of Appeals remanding the cause to the district court with instructions to dissolve the temporary injunction is unquestionably correct. The Petitioners do not, either in the Petition or the supporting brief, challenge this ruling. The Petition should therefore be denied.

The facts pleaded (Complaint, R. 2-14, Amended Answer, R. 94-106), as well as all of the facts shown in evidence, present a labor dispute within the meaning of the Norris-LaGuardia Act, Title 29, U. S. C. A., Sec. 101 *et seq.*, and particularly Section 108 and Section 113 (a) and (c), thereof. In this case the Brotherhood's claim of exclusive right to perform the Services in Controversy is predicated upon its contracts with Carrier, as well as long established custom which this record discloses have been in continuous existence at least from the first collective bargaining agreement with the Carrier (Stipulation of Facts, R. 653) up to the current agreement effective November 1, 1929 (Exhibit G, R. 252-312). These contracts govern the wages, hours and working conditions of Conductors and Brakemen on the Carrier lines. The several services covered by Exhibit G were all Trainmen services. The Trainmen class includes Brakemen. This classification in the various services is carried throughout the contract. Among other provisions of the contract pertinent to the Brotherhood's claim are the following: Article 1 (R. 255); Article 42 (d) (R.

287); Article 45 (a), (b), (c) and (h) (R. 289-290); and Article 58 (R. 295). The Services in Controversy constitute a portion of the duties of Brakemen not only on the Carrier but on railroads generally throughout the country (R. 585). Thus, the dispute between the Brotherhood and the Carrier necessarily involves an interpretation and application of the Brotherhood's agreement. The Porters' claim of right to the performance of the Services in Controversy likewise arises out of their interpretation of their contract and alleged custom with the Carrier.

Since the claim of the Porters against the Carrier and the separate and independent claim of the Brotherhood against the Carrier to the right to perform the Services in Controversy encompass the same sphere of railroad employee activity, there exists a jurisdictional labor dispute between the Porters and the Brotherhood within the purview of the Railway Labor Act.

The disputes thus presented are to be determined only by the processes set up under the Railway Labor Act and are not justiciable in the federal courts. *Order of Railway Conductors of America* v. *Pitney et al.*, 326 U. S. 561, 66 S. Ct. 322; *Order of Railroad Telegraphers* v. *New Orleans, Texas and Mexico Ry. Co.*, 156 F. 2d 1, Cert. Den. 329 U. S. 758, 67 S. Ct. 112.

The dispute between the Porters and the Carrier as to the Carrier's right to cancel the Porters' contract and to negotiate a new contract was within the sole jurisdiction of the Mediation Board. Title 45, U. S. C. A., Sec. 152, Seventh, Sec. 156. Positive failure of the Porters with respect to their dispute with the Carrier to comply with the obligation imposed upon them by Section 152, First, of the Railway Labor Act is a clear violation of Section 108 of the Norris-LaGuardia Act which made it mandatory upon the Porters to exhaust every reasonable effort to settle and dispose of their disputes either by negotiation

or with the aid of any available governmental machinery of mediation or voluntary arbitration as a condition precedent to the right of injunctive relief. *Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27,* v. *Toledo, P. & W. R. R.*, 321 U. S. 50, 64 S. Ct. 413, 414, 416, 417, 418, 420; *United States* v. *Hutchison*, 312 U. S. 219, 234, 61 S. Ct. 463, 467; *Cole et al.* v. *Atlanta Terminal et al.*, 16 F. Supp. 131, 133.

Therefore, independent of all other phases of this case, the ruling of the Circuit Court of Appeals (R. 698, 699) on this question and its judgment based thereon are undeniably correct and are amply supported by the record in the case and the applicable principles of law announced in the foregoing cited authorities. The ruling is unchallenged and the petition should be denied.

POINT B.

Questions I, II, and III in the Petition do not present any question arising on the record in this case because as shown by the pleadings and the evidence the controversies between the Petitioners and the Carrier and between these respondents and the Carrier are under the applicable law as announced by this and other courts justiciable solely under the provisions of the Railway Labor Act and by the boards and tribunals provided for in the act.

Under Point A we have pointed out the nature of the disputes between the Porters and the Carrier and between the Brotherhood and the Carrier which constitute the subject matter here involved. The Brotherhood's contention that the District Court had no jurisdiction over the subject matter in this case is squarely upheld by the controlling and applicable decisions of this court in the following cases: *Order of Railway Conductors of Amer-*

ica v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322; *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 64 S. Ct. 95; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas R. R.* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 64 S. Ct. 146; *General Committee of Adjustment of Brotherhood of Locomotive Firemen and Engineers* v. *Southern Pac. Co. et al.*, 320 U. S. 338, 64 S. Ct. 142. To the same effect is the ruling of the Eighth Circuit Court of Appeals in *Order of Railroad Telegraphers* v. *New Orleans, Texas and Mexico Ry. Co. et al.*, 156 F. 2d 1, cert. den., 329 U. S. 758, 67 S. Ct. 112, and of the Fifth Circuit in *Brotherhood of Railroad Trainmen* v. *Texas & P. Ry. Co.*, 159 F. 2d 822, cert. den., 68 S. Ct. 62, rehearing den., 68 S. Ct. 149. Therefore, in ruling that the issuance of the temporary injunction by the District Court was erroneous, in view of the Railway Labor Act as well as in view of the Norris-LaGuardia Act and in applying the applicable principles announced by this court in the *Pitney Case, supra*, and in the other cases cited above, the Eighth Circuit Court of Appeals ruled correctly and its judgment in so far as it is based on such ruling cannot be successfully attacked.

Petitioners under "Reasons Relied Upon" in the petition, and particularly Reasons V, VI and VII, say that the decision of the Eighth Circuit Court of Appeals is in conflict with the decisions of this court and of other courts of appeals and certain state courts noted thereunder. As near as we can discern from reading their brief, the Petitioners undertake to discuss this matter of conflict under Points 5 and 6 thereof. No where in their discussion of the subject do the Petitioners demonstrate any such alleged conflict. This court has established the general rule applicable to this case in its decisions in the *Pitney Case*, the *Switchmen's Union Case* and the *General Com-*

mittee Cases. The *Steele Case,* 323 U. S. 192, 65 S. Ct. 226 and the *Tunstall Case,* 323 U. S. 210, 65 S. Ct. 235, referred to in Reason V of the Petition and in Point 5 of the brief are cases involving factual situations which are completely different from the factual situation presented on the record in the case at bar. These cases deal with and decide only issues involving a very narrow exception to the general rule announced and applied by this Court in the *Pitney Case,* the *Switchmen's Union Case* and the *General Committee Cases.* A very clear distinction between the class of cases to which the case at bar belongs and the class of cases to which the decisions of the *Steele* and *Tunstall Cases* may be applicable is set forth in the Fifth Circuit Court of Appeals' opinion in *Brotherhood of Railroad Trainmen* v. *Texas & P. Ry. Co.,* 159 F. 2d 822, 826, and in which case this Court denied certiorari and denied rehearing.

It takes but a cursory reading of this court's opinion in *Moore* v. *Illinois Central Railroad Co.,* 312 U. S. 630, 61 S. Ct. 754, to demonstrate that there is no conflict between the decision of the Circuit Court of Appeals in the case at bar and this Court's decision in that case. The cases present two entirely different situations. In the *Moore case* the action was at law for damages claimed to have been sustained as the result of an alleged wrongful discharge of the employee involved. The action in this case seeks equitable relief at the hands of the equity court. So far as might be pertinent to any discussion here, the only question present in the *Moore Case* and on which this Court passed was whether there was an election of remedies available to the employee prior to a time that he may have availed himself of the procedures accorded him under the Railway Labor Act and set the machinery of that Act in motion. There was no question raised or passed upon by this Court in the *Moore Case* involving

the adequacy of any remedy that the employee had in that case. The claim of the Porters in the case at bar is predicated upon the asserted inadequacy of the remedies available to them under the Railway Labor Act. The question, if any, which this claim presents in this case has no relation whatever to the question of election of remedies such as was presented in the *Moore case*. The questions presented on the record in this case so far as the Petitioners' claim of inadequacy of remedy is concerned, come squarely within the purview of and are ruled by the decisions of this Court in the *Pitney Case*, the *Switchmen's Union Case* and the *General Committee Cases*, as well as by the decision of the Eighth Circuit Court of Appeals in the *Order of Railroad Telegraphers Case* and of the Fifth Circuit in the *Texas & P. Ry. Co. Case*.

Although Petitioners do not point out wherein the decision of the Eighth Circuit Court of Appeals in the case at bar (R. 695-705, 164 F. 2d 4) is in conflict with the same court's decision in *Gaskill* v. *Roth*, 151 F. 2d 366, cert. den. 327 U. S. 798, 66 S. Ct. 896, rehearing den. 328 U. S. 876, 66 S. Ct. 975, we cannot from a reading of the *Gaskill Case* comprehend any possible basis for the Petitioners' claim of conflict. The *Gaskill Case* was an action by certain conductors and brakemen against a carrier and the Order of Railway Conductors and the Brotherhood of Railroad Trainmen in which the plaintiff conductors and brakemen sought to have the court declare that the carrier had prejudiced the existing collective bargaining agreement with respect to not assigning to them certain interdivisional work on the carrier lines, which work plaintiffs claim was accorded them by the contract, and to have an accounting for the moneys that should have been paid them for such work had the work been assigned as claimed.

No question of adequacy of remedy was before the Eighth Circuit Court of Appeals in the *Gaskill Case* for decision. Furthermore, the Eighth Circuit in its opinion very carefully distinguished between its judicial power to pass on the subject matter of an alleged breach of a collective bargaining contract and its lack of power to interfere with such matters properly within the sphere of collective bargaining negotiations. The situation and the issues before the court in the *Gaskill Case* and the situation and issues presented in this case are utterly dissimilar. Also, this Court will note that the purported claim of conflict with the decision in the *Gaskill Case* is not a claim of conflict with a decision of another Circuit Court of Appeals. The Eighth Circuit decided both the *Gaskill Case* and this case. It is, therefore, strange that if Petitioners had any complaint about the decision of the Eighth Circuit in the case at bar that was founded on any ruling of the Eighth Circuit in the *Gaskill Case* they did not call such complaint to the attention of the Court in their petition for rehearing filed in this case (R. 709-714). If on any theory at all it can be argued that the decision in this case is in conflict with the decision in the *Gaskill Case,* then to that extent the *Gaskill Case* has been overruled by the controlling decisions of this court in the *Pitney* and other cases cited by these respondents, *supra,* and by the Eighth Circuit's own later decisions in the *Order of Railroad Telegraphers Case* and in this case.

What we have said with respect to the Petitioners' purported claim of conflict between the Eighth Circuit's decision in this case and the decision of this Court in *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, 61 S. Ct. 754, likewise completely disposes of Petitioners' similar contention with respect to the decision of the United States Court of Appeals for the District of Columbia in *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235.

The decision in *Southern Ry. Co.* v. *Order of Railway Conductors*, 63 F. Supp. 306, adverted to under paragraph VI of the "Reasons Relied Upon" in the Petition, and likewise discussed in the supporting brief under Point VI, is not a decision by any Circuit Court of Appeals. It is a decision by the District Court for the Eastern District of South Carolina, Charleston Division. We do not understand that alleged conflict with such a decision affords any ground for the issuance of this Court's writ of certiorari. However, we will note here that the decision of the District Court in the *Southern Ry. Co. Case* was rendered on a motion to remand the case to the state court from which it had been removed. The action itself was one for a declaratory judgment to construe a contract of employment between the Railway Company and the railway conductors. So far as the opinion of the District Court in the *Southern Ry. Co. Case* discusses the abstract proposition of election of remedies, the discussion follows the reasoning of this Court's opinion in the *Moore Case*. In view of this Court's decision in the *Pitney Case* and other cases cited, *supra*, the *Southern Ry. Co. Case* is not authority for any proposition here. This Court in its decision in the *Pitney Case*, 326 U. S. 561, 566, 567, 66 S. Ct. 322, 325, pointed out:

> "* * * interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of the words and their position. * * *"

We do not undertake to discuss the Petitioners' purported claim of conflict with respect to the New York and Georgia decisions referred to in the supporting brief and under VII of the "Reasons Relied Upon" in the Petition for the reason that we do not understand any such conflict, even if it existed, is a ground calling for the issuance of

this Court's writ in the character of case which we are dealing with at bar.

Petitioners under Point VIII of the supporting brief involve themselves in a contradiction. They have complained of the Eighth Circuit Court of Appeals following and applying this Court's decision in the *Pitney Case*, but they now say that the *Pitney Case* is not in conflict with the decision of that Court in this case. Petitioners go further and state that the *Pitney Case* supports the judgment of the District Court. There seems to us to be only one explanation for that statement—either Petitioners are unwilling to recognize the true issues presented on the record in this case, or they have not read the *Pitney Case* with any understanding as to its meaning. The *Pitney Case* squarely supports the decision of the Eighth Circuit and conclusively determines that the District Court erred in issuing the temporary injunction.

POINT C.

Question IV presented in the Petition does not arise on the record in this case. Whether one union goes to Division One of the Adjustment Board, whereas another union goes to Division Four of the Adjustment Board for a determination of their respective disputes with the Carrier is of no consequence. The Railway Labor Act affords a full, complete and adequate remedy for the disputants in each instance.

The answer to Question IV is found in the Railway Labor Act itself. By Section 153, First, of the Act, Congress has taken great pains to afford all employees covered by the Act a full and complete hearing of all of their disputes with their carrier employers coming within the jurisdictional limitations of the Four Divisions of the Board. Congress has likewise set up very elaborate machinery to

insure an impartial selection of the members on these boards, the method for the handling of disputes and for deciding the same and issuing final and binding awards thereon. Congress has further provided that as to awards favorable to any employee or employee group, those awards, upon the Carrier's failure to comply with the orders of the Board, may be enforced against the Carrier in the federal courts. The remedies thus afforded are complete and adequate. The fact that the Brotherhood in this case is relegated to the First Division of the Adjustment Board, because its disputes with the Carrier come within the jurisdiction of that Division, and that the Porters with respect to their disputes are relegated to the Fourth Division for the same reason and that, therefore, their separate disputes with the Carrier will receive independent treatment is of no consequence. Congress by Section 153, First (h), divided the Adjustment Board into four divisions whose proceedings shall be independent of one another. This element of independence has no bearing upon the power of any division. Each is empowered to decide disputes coming within its defined jurisdictional limitations, and each is empowered to enter awards on such disputes, which are final and binding and all awards favorable to employees or employee groups, whether rendered by the First Division, the Fourth Division or any other Division of the Adjustment Board, are enforceable against the Carrier in the federal courts.

Under Point VIII of the supporting brief Petitioners claim that resort to the Mediation Board with reference to the Carrier's proposal to terminate the existing contract is likewise an inadequate remedy. There can be no merit to this contention. The Petitioners' dispute with the Carrier in this connection falls squarely within the jurisdiction of the Mediation Board, Section 155, First (a) and (b).

The Mediation Board has been specially designed by Congress to bring about the amicable settlement of disputes. Section 152, First, makes it mandatory upon the Petitioners, as well as the Carrier, to exert every reasonable effort to make and maintain their agreements concerning rates of pay, rules and working conditions and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of such disputes.

In their brief Petitioners state the Mediation Board is powerless in their situation, at least against the objection of the Trainmen. No basis for that statement can be found in the record or in the Railway Labor Act. The Trainmen have nothing to do with the Petitioners' dispute with the Carrier arising out of the Carrier's proposed cancelation of Petitioners' contract and there is nothing in the Railway Labor Act which either gives the Trainmen any right or permission to intervene in negotiations between the Petitioners and the Carrier before the Mediation Board or to object to the same.

Also under Point VIII Petitioners make the blanket assertion that there is no dispute between the Porters and the Carrier as to the interpretation or application of their contract. That statement is not supported by either the facts pleaded or the facts shown in evidence. The Porters claim a contractual right to perform the Services in Controversy. The Carrier's answer (R. 21-23, 25) and the facts shown in evidence deny the existence of any such contractual right (R. 562).

Petitioners also speak of the Adjustment Board having no jurisdiction of disputes between one group of employees and another group of employees. So far as the application of the Railway Labor Act is concerned, that issue does not arise on this record. The disputes which

the Porters have arising out of the claimed interpretation and application of their contract and the Carrier's proposed cancelation of the contract are between the Porters and the Carrier. As to any interest of the Brotherhood therein, such disputes are as though they were nonexistent. There is nothing whatever in this record to show what the results would have been had the Porters availed themselves of their remedies before the Adjustment Board and before the Mediation Board. Neither is there anything to show that those remedies were in the slightest degree inadequate. The Porters cannot claim inadequacy of the remedy because they did not avail themselves of the remedy. This Court has held that until the procedures afforded by the Railway Labor Act have been complied with and the agencies created by that Act have acted, the parties in the position of the Porters cannot show "irreparable loss and inadequacy of the legal remedy," *Pitney Case, supra,* 326 U. S. 561, 567, 66 S. Ct. 322, 325. See also *Mellon Co.* v. *Charles McCafferty,* 239 U. S. 134, 36 S. Ct. 94, 95; *Myers* v. *Bethlehem Ship Building Corporation,* 303 U. S. 41, 50, 51, 52, 58 S. Ct. 459, 463, 464, and to the same effect, *Kansas City Southern Railway Co.* v. *Cornish et al.,* 65 F. 2d 671; 30 C. J. S., Sec. 26, p. 353.

POINT D.

Questions V and VI presented in the Petition do not arise on the record in this case because the facts pleaded and all the facts shown in evidence show that these respondents were not guilty of a common law tort.

These questions appear to be discussed under Points IX and X of the Petitioners' supporting brief. The complete answer to Questions V and VI is that the Petitioners did not under the pleadings and the facts shown in evi-

dence make a case of common law tort against these respondents. On the record in this case these respondents have, and have had for a long period of time, a dispute with the Carrier involving an interpretation and application of their contract. These respondents have claimed and are claiming by their contract, as well as long established custom, the exclusive right to perform the Services in Controversy. That dispute is solely between these respondents and the Carrier. These respondents have the lawful right to assert and prosecute these claims against the Carrier to a decision by lawful means and to that end the Congress accorded to them and all others similarly situated the legal remedies created by the Railway Labor Act. The course which these respondents have adopted in an effort to enforce these claims against the Carrier is strictly within the purview of the Railway Labor Act. Cutting away all fallacies in arguments to the contrary, the course of action which the Brotherhood has pursued in this case had nothing whatever to do with Carrier's announced intention to cancel the Porters' contract. The Brotherhood at no time requested the Carrier to so conduct itself with the Porters, nor did it at any time either directly or indirectly express any desire that the Carrier should cancel that contract. It is obvious from the record in this case the Carrier's conduct with respect to the Porters was nothing more than the exercise of its own independent business judgment unaffected by anything the Brotherhood has done or intends to do with respect to processing the time claims against the Carrier to the Adjustment Board and was in pursuit of the right which the Carrier has under the Railway Labor Act, Section 152, Seventh, Section 156; but even assuming for the sake of argument that the Carrier was influenced by the Brotherhood's announced intention to process these time claims, nevertheless under all the applicable authorities

the Brotherhood had the lawful right to pursue the lawful course which it has pursued and no right of action either at law or in equity arises against it and in favor of the Porters. 17 C. J. S., Sec. 172, p. 532; Restatement of Law of Torts, Section 773, page 87; *National Labor Relations Board* v. *Karp Metal Products Co., Inc.*, 134 F. 2d 954, 955; *Portland Hotel Corporation* v. *Fidelity Storage Corporation*, 132 F. 2d 57; *In re Prima Co.*, 98 F. 2d 952, 965; *Orr* v. *Mutual Benefit Health & Accident Association*, 207 S. W. 2d 511, 515.

POINT E.

Question VII presented in the Petition does not arise on the record in this case for the reason that in this case there is absolutely no issue whatever as to racial discrimination of any kind or as to whether the porters, whose membership is negro, have or can have a fair hearing before either the Adjustment Board or the Mediation Board.

By stretching their imagination far beyond any facts shown in the record in this case and by indulging in wholly unwarranted and unsupported presumptions, the Petitioners have made a most strenuous attempt to challenge the attention of this Court to this case by the specious device of contending that the Porters, because they are Negroes, cannot have a fair and impartial hearing before the Adjustment Board for the reason that the labor representatives or members of the Board are prejudiced against Negroes performing any work in connection with transportation or movement of trains. Any well founded assertion in that regard would be serious, but to so contend on the record in this case is nothing short of contending a rank absurdity.

The Porters have submitted nothing to the Adjustment Board for hearing and decision. The Porters have ignored their remedies before the Mediation Board. There is no evidence in the record of this case as to the identity of all labor organizations having representation in the selection of the labor members of the Adjustment Board or any particular division thereof. There is no evidence that the Porters are not themselves so represented. There is no evidence that any of the three individual labor members of the Fourth Division to which the Porters take their disputes have any prejudice or bias against Porters because they are Negroes. For that matter there is no single bit of evidence in this record that any member of the Fourth Division, the First Division or any other division of the Board, whether such member be a management representative or a labor representative, is in any way prejudiced or biased either for or against any party to this suit, the Porters included. There is no evidence that any of the three members of the Mediation Board (who incidentally are appointed by the President) have any bias or prejudice against the Porters.

Without having submitted anything whatever for negotiation, trial, hearing, decision, mediation or arbitration under the procedures provided by the Railway Labor Act and without any evidence whatever of any bias of prejudice on the part of any member of any board or tribunal empowered to administer those procedures, how can the Porters contend that they have been or will be deprived of their right to a fair and impartial hearing. *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810, 814.

It is utterly beside the point in this case that the respondent Brotherhood of Railroad Trainmen has for a great many years by its constitution and bylaws excluded Negroes from membership in its fraternal organization. This, of course, does not mean that the Brotherhood does

not represent Negroes who may be members of the railroad crafts for which it is the authorized collective bargaining representative. This becomes all the more beside the point in this case when we realize that the Porters belong to a railroad craft entirely separate and distinct from any craft that is represented by the Brotherhood and in connection with their collective bargaining rights and other rights under the Railway Labor Act are represented by their own international labor union, the Petitioner, the Brotherhood of Sleeping Car Porters, etc.

To support this fictional theory, the Petitioners under Point IV of their supporting brief direct attention to the following cases: *Hill* v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159; *Patton* v. *Mississippi*, 68 S. Ct. 184; and *Steele* v. *Louisville and N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226. There is no similarity whatever between those cases and the case at bar. The *Hill and Patton Cases* involve a denial by the states of Texas and Mississippi of the constitutional right of the petitioners therein under the Fourteenth Amendment to the Constitution of the United States to equal protection of the laws. No such question arises on the record in this case and no such question has been raised or preserved by the pleadings or at any other stage of the proceedings had in this case either in the District Court or the Eighth Circuit Court of Appeals. Furthermore, until the Petitioners have shown by evidence that they have been adversely injured by some real violation of a constitutional right, they cannot raise any such constitutional question and until such showing is made we do not understand that this Court will exercise its power to rule thereon. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 463, 464, 65 S. Ct. 1384, 1390, 1391; *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324, 325, 65 S. Ct. 298, 303.

The *Steele Case* involves a situation wherein a labor union in its collective bargaining negotiations with the carrier discriminated against the Negro members of the craft which it was representing solely on racial grounds, when it was the union's legal obligation to represent the very people it was discriminating against to the same extent it was obligated to represent the other members of the craft in question. No such question arises on the record in this case.

Petitioners have attached to their supporting brief and under Point VI thereof have referred to appendices A and B, the same being the district court's opinion in the *Hunter et al.* v. *Atchison, Topeka & Santa Fe Ry. Co. Case* and the court's findings of fact, conclusions of law and order for temporary injunction in that case. While we understand that opinion is not properly a part of the supporting brief, still we note that the questions presented in the *Hunter Case* are wholly dissimilar to the questions on the record in the case at bar. Apparently the only reason the Petitioners had for attaching the opinion as an appendix was for the questionable satisfaction they may have derived from the district court's statement to the effect that perhaps the National Railroad Adjustment Board is a prejudiced tribunal when Negro and white employees are involved. The *Hunter* opinion does not hold that the Board is so prejudiced and for all that might appear from the reading of the opinion and the court's findings of fact and conclusions of law, the statement seems to be gratuitous.

POINT F.

Reasons VIII and IX of the "Reasons Relied Upon" as set out in the Petition do not appear to be related to any of the questions numbered I to VII, inclusive, presented in the Petition, nor do we find anywhere in the

supporting brief where these reasons are discussed or their applicability to this case pointed out or any authority cited in support thereof. They are obviously reasons which the record in this case wholly fails to support, and in so far as they may be said to be material in any respect we feel that we have adequately disposed of them by the preceding argument and authorities cited in support thereof.

CONCLUSION.

When the pleadings and the record in this case are analyzed, it is perfectly obvious that what the Porters are seeking to do is to invoke the injunctive power of the federal courts for the sole purpose of forever eliminating all legal remedies available to these respondents by which they can legally enforce their lawful claims against the Carrier. To permit this to be accomplished by temporary injunction or otherwise is in itself to deny to these respondents due process and the equal protection of the laws which is guaranteed to them and all other citizens by the Constitution of the United States. Unless the judgment of the Circuit Court of Appeals is permitted to stand, the denial of these rights which has been in effect since June 24, 1946, will become a continuing actuality. The judgment of the Eighth Circuit Court of Appeals in this case is unquestionably correct and for all of the reasons above cited and the authorities cited in support thereof, these respondents respectfully submit that the

Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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SUBJECT INDEX

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In the

Supreme Court of the United States

OCTOBER TERM, 1947

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Petitioners,

v.

A. PHILLIP RANDOLPH, *et al.*,
Respondents.

PETITION OF MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THREE CONSOLIDATED CAUSES, NOS. 13564 AND 13565 ENTITLED "MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL. VERSUS A. PHILLIP RANDOLPH, ET AL." AND NO. 13566 ENTITLED "R. D. WOOD, ET AL. VERSUS A. PHILLIP RANDOLPH, ET AL".

To the Honorable, the Supreme Court of the United States:

Petitioners, Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, respectfully request this Court to review on writ of certiorari the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit in three consolidated causes, Nos. 13564 and 13565 entitled "Missouri-Kansas-Texas Railroad Company, et al. v. A. Phillip Ran-

dolph, et al.," and No. 13566 entitled "R. D. Wood, et al. v. A. Phillip Randolph, et al."

Another petition for writ of certiorari in these causes, Docket No. 661, has been filed by A. Phillip Randolph and all other plaintiffs in the District Court who were appellees in the Circuit Court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Two classes of employees of the railroad petitioners, namely, brakemen (sometimes called trainmen) and train porters, claim the right to perform for railroad petitioners certain identical services incident to train operations. As correctly found by the Circuit Court,—

> "neither the agreement between the railroad companies and the train porters, nor that between the railroad trainmen and the railroads, states in so many words that the railroads agree to give the work in question to either of the groups or both" [R. 700; *164 F. (2d) 7*].

The Brotherhood of Railroad Trainmen protested the use by the railroad petitioners of any employees other than brakemen in the performance of said work, stating in their letter of April 1, 1946 (R. 239) that:

> "Unless the practice of requiring or permitting these employees to perform brakemen's duties is discontinued within ten (10) days from the date of this letter, claim will be filed for each available brakeman on M-K-T Lines first out on extra board at time such train is run on which this service is performed by other than a qualified brakeman, on the same basis as though such brakeman was used to perform all of the brakemen's duties and work on such passenger trains" (R. 240-241).

The same controversy had arisen on other railroads and, upon petition of the brakemen, the First Division of the National Railroad Adjustment Board in four awards* held that the railroad companies violated their agreements with the brakemen when they permitted train porters to perform work similar to the work now in controversy.

In three of those awards, Nos. 5906, 5907, and 7251, the Board, without a Referee, sustained the complaint or claim "without retroactive adjustment in compensation"; but in award 6640, the Board, by Referee James B. Riley, after holding that the use of porters violated the seniority rights of brakemen, declared:

> "It follows that protest and specific claim should be sustained. Claim that like settlement shall be made in all instances of similar nature now on file is likewise sustained" (page 18).

Confronted with these awards and the positive declaration of the Brotherhood of Railroad Trainmen that claims would be filed if train porters continued to perform any of this work (R. 240-241), the railroad petitioners decided to discontinue using train porters for this service. Their

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* Award No. 5906, Docket 9898, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit X to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 5907, Docket 9899, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit Y to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 6640, Docket 7400, dated April 20, 1942, involving The Atchison, Topeka and Santa Fe Railway Company—Eastern and Western Lines (Exhibit W to Stipulation of Facts, not printed; R. 220, 223, 655); and

Award No. 7251, Docket 14777, dated September 3, 1942, involving The Texas and Pacific Railway Company (Exhibit Z to Stipulation of Facts, not printed; R. 220, 223, 655).

decision was influenced not only by these awards and this declaration of the Brotherhood, but also by the following factors:

1. The decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318*, in which it was held that the National Railroad Adjustment Board should construe the contracts of two opposing unions and decide which group of employees should perform the disputed work.

2. The inability of the railroad petitioners to bring the brakemen and the train porters before the same Division of the National Railroad Adjustment Board [R. 518-520; 45 U. S. C. A. Sec. 153(h)] for a single and conclusive decision, and the possibility that the First Division would render an award in favor of the brakemen against the railroad petitioners while the Fourth Division would render an award in favor of the train porters against the railroad petitioners, thus creating a chaotic condition and impossible situation.

3. The holding of this Court that an award of the National Railroad Adjustment Board is more than an advisory opinion, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 720-721, 65 S. Ct. 1282, 89 L. Ed. 1886*, and the tendency of this Court to sustain an award of the Board upon a "factual question" which "is intricate and technical" because rendered by "an agency especially competent and specifically designated to deal with it", *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318.*

4. The inability of the railroad petitioners to initiate an action testing the validity of an adverse award because the right of review, at the instigation of a railroad company, is not granted by the Railway Labor Act, *Washington Terminal Co. v. Boswell, 124 Fed. (2d) 235, 240;* affirmed by divided Court, *319 U. S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694.*

5. The knowledge that the Brotherhood of Railroad Trainmen would resort to a strike vote to enforce an award against the railroad petitioners (R. 619), as it did in the *Southern Pacific case* (R. 617-618), instead of suing on the award as contemplated by the Railway Labor Act [45 U. S. C. A. Sec. 153(p)].

Accordingly, the railroad petitioners gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156). By telegram dated April 12, 1946 (R. 241), the railroad petitioners notified T. D. McNeal, representative of the train porters (R. 466-467), that the Brotherhood of Railroad Trainmen was protesting the use of train porters to perform the work in controversy. By letter dated April 15, 1946 (R. 242), the railroad petitioners notified McNeal of their intention to cancel the train porters' agreement effective May 16, 1946, and to negotiate a new agreement. A conference was arranged for May 4, 1946 (R. 244) but postponed to and held on May 7, 1946 (R. 245, 256). No agreement was reached, the conference was adjourned, and the effective date for cancellation of the agreement was postponed

(R. 246). Another conference was held on May 22, 1946, and adjourned to a later date to be mutually agreed upon (R. 248). The final conference was held on June 7, 1946 (R. 250). Verbally and by letter of that date, the railroad petitioners notified the train porters that the agreement would be cancelled at midnight on June 30, 1946, and that petitioners were willing to negotiate another agreement which would expressly exclude the work in controversy (R. 250-251). Services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

Having complied with the terms of the train porters' agreement* (R. 233-234) and with the provisions of the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156), the railroad petitioners had the legal right to cancel the train porters' agreement at midnight on June 30, 1946, and thereafter to negotiate a new agreement with the train porters which would expressly exclude the work in controversy. The Circuit Court so held:

> "The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698; *164 Fed. (2d) 5-6*].

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* The second paragraph of Article XI of the train porters' agreement reads in part as follows:

> "These rules and regulations shall remain in full force and effect * * * until written fifteen (15) days' notice is served, setting forth any change that is desired by either the railway or employes, and a hearing will be given within fifteen (15) days after receipt of notice" (R. 233-234).

> "The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; *164 Fed. (2d) 9*].

The train porters do not challenge this right of the railroad petitioners. They merely contend that the right should not be exercised because the action of these petitioners has been induced by wrongful acts of the brakemen.

To forestall the exercise of this right by the railroad petitioners, the train porters filed this injunctive action on June 24, 1946 (R. 16) and on that date procured a temporary restraining order (R. 16-18) which prevented the railroad petitioners from discontinuing on June 30, 1946, the use of train porters in the performance of the work in controversy.

By successive orders of the District Court (R. 19, 35, 75), the temporary restraining order was kept in effect until issuance of a temporary injunction on March 5, 1947 (R. 160-163) which followed hearings on January 20, 21, 22, 1947 (R. 86, 107, 210-633).

The Circuit Court correctly ordered a dissolution of the temporary injunction against the railroad petitioners [R. 705; *164 Fed. (2d) 9*].

Had the temporary restraining order and the temporary injunction not been issued, these petitioners, at midnight on June 30, 1946, would have discontinued using train porters to perform the work in controversy (R. 250). Because of the temporary restraining order and temporary

injunction, petitioners have continued to permit train porters, as well as other employees, to do such work.

The undisputed evidence shows that the claims of the brakemen, since June 30, 1946, are accruing at the rate of $514.90 per day (R. 542); that the potential liability of the railroad petitioners was $78,779.70 when the District Court on November 30, 1946, overruled (R. 75) their motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52); that the potential liability of the railroad petitioners totaled $140,052.80 when the District Court on March 29, 1947, overruled (R. 183) the motion (R. 176-180) of these petitioners to increase the amount of the temporary injunction bond from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect the railroad petitioners against the payment of such costs and damages as they might suffer or incur if they or either of them were found to have been wrongfully enjoined or restrained; and that the potential liability of the railroad petitioners will be $329,536.00 on March 31, 1948.

The insufficiency of the temporary restraining order bond and the temporary injunction bond was urged before the Circuit Court in Points 3, 4, 5 and 6 reading as follows:

> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".

"4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction".

The Circuit Court did not pass upon these points. Except to state that respondents complained of the terms upon which the temporary injunction was issued [R. 704; *164 Fed. (2d) 9*], that Court made no reference to the inadequacy of the temporary restraining order bond and the temporary injunction bond. The Court, however, did make this general observation:

"* * * the temporary injunction, insofar as it runs against the railroads, was induced solely by the court's conclusion that the trainmen were guilty of past and threatened tortious conduct, wrongfully coercing the railroads into their proposed action, which it considered enjoinable. It is clear from the record that no injunction would have been issued against the railroads except upon that consideration and such was the theory of the plaintiffs' case as against the railroads" [R. 704-705; *164 Fed. (2d) 9*].

Regardless of the reason for the temporary restraining order and the temporary injunction against these petitioners, they were and are entitled to the protection contemplated by Rule 65(c) of the Federal Rules of Civil Procedure. This protection has been denied them in the instant case.

The net result is that the railroad petitioners have been given a $500.00 bond to protect them against a potential liability of $329,536.00, as of March 31, 1948, which is increasing at the rate of $514.90 per day, solely as a result of the temporary restraining order and the temporary injunction which the Circuit Court has declared never should have been issued.

The railroad petitioners complain of the following errors of the Circuit Court:

1. Having correctly held that the railroad petitioners had and have the legal right to cancel their agreement with the train porters and to negotiate a new agreement which expressly excludes the work in controversy [R. 697-698, 705; *164 Fed. (2d) 5-6, 9*], the Circuit Court erred in holding,—

(a) That "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; *164 Fed. (2d) 7*].

(b) That "the controversy presented is a jurisdictional labor dispute within the purview of the Railway Labor Act * * * and a labor dispute within the meaning of the Norris-LaGuardia Act" [R. 698-699; *164 Fed. (2d) 6*];

(c) That "the question of interpretation and application of the labor contracts here is of the same intricacy and calls for the same special familiarity with railroad work and labor relations" as in the case of *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318* [R. 701; *164 Fed. (2d) 7*]; and

(d) That "the issuance of a temporary injunction was erroneous in view of the statutes and the decision of the Supreme Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318*" [R. 699; *164 Fed. (2d) 6*].

Since the railroad petitioners had and have the legal right to cancel their contract with the train porters and to negotiate a new contract which expressly excludes the work in controversy, which right is not questioned by the train porters, it necessarily follows that there is no labor dispute which can be taken to the National Railroad Adjustment Board or to the National Mediation Board. As between the railroad petitioners and their train porters, the sole question is whether or not these petitioners should be enjoined from exercising their legal right because their action has been induced by the alleged wrongful acts of the brakemen. This is purely a question of law which only the Courts can answer. Power to answer it does not repose in the National Railroad Adjustment Board or in the National Mediation Board. The *Pitney case* is no authority for sending this question to either of those Boards. That case, as well as the *Southern Pacific, Texas and Pacific*, and *Santa Fe cases* before the Adjustment Board [Footnotes: R. 700; *164 Fed. (2d) 7*], merely involved the proper interpretation of conflicting agreements. In none of those cases, as in

this case, had the railroad companies, "after due notice and in accord with the provisions of the Railway Labor Act" [R. 698; *164 Fed. (2d) 6*], sought to cancel one contract and to negotiate a new contract expressly eliminating the work in controversy. These facts distinguish the *Pitney case*, and the other cases, from the case at bar and show why there is no present labor dispute within the jurisdiction of the National Railroad Adjustment Board or the National Mediation Board.

2. Having correctly held that the railroad petitioners had and have the legal right to cancel their agreement with the train porters and to negotiate a new agreement which expressly excludes the work in controversy [R. 697-698, 705; *164 Fed. (2d) 5-6, 9*], the Circuit Court erred in stating, with reference to such action of the railroad petitioners, that "the statute gives the porters the right to resort to the Mediation Board" [R. 703; *164 Fed. (2d) 8*].

The Circuit Court correctly found that the railroad petitioners proposed to cancel their contract with the train porters and to negotiate a new contract expressly excluding the work in controversy "after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156" [R. 698; *164 Fed. (2d) 6*]. Section 152 Seventh of that Act authorizes changes in rates of pay, rules, or working conditions, as embodied in agreements, provided such changes are made "in the manner prescribed in such agreements or in section 156 of this title". In attempting to withdraw the disputed work from the train porters, the railroad petitioners proceeded both "in the manner prescribed" in the train porters' agreement

(R. 233-234) and in the manner provided in Section 156. Changes made in accordance with an agreement are not subject to review by the National Mediation Board, and proposed changes under Section 156 may be made at the expiration of ten days from the termination of conferences, if there has been no request for or proffer of the services of the Mediation Board. In the instant case, conferences terminated on June 7, 1946 (R. 250) and services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560). It necessarily follows that the train porters have no right to resort to the National Mediation Board.

3. Having correctly held that "the issuance of the temporary injunction was erroneous" [R. 699; *164 Fed. (2d) 6*] and that it should be "dissolved as to the railroads" [R. 705; *164 Fed. (2d) 9*], the Circuit Court erred, as did the District Court, in failing and refusing to order the train porters to give security, as required by Rule 65(c) of the Federal Rules of Civil Procedure, in a sum sufficient to protect the railroad petitioners from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day, solely because of the temporary restraining order and the temporary injunction.

Rule 65(c) of the Federal Rules of Civil Procedure prohibits the issuance of a temporary restraining order or a temporary injunction except upon the giving of security by the applicant "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained".

While the security under the rule shall be "in such sum as the court deems proper", the Court must exercise "his sound discretion, which discretion, however, is a legal and not an arbitrary one", and the Court must not lose sight of the purpose of the bond which is "to insure with all practicable certainty" that the person enjoined "may sustain no ultimate loss, in case the injunction should be dissolved", *Corpus Juris Secundum, Injunctions, Vol. 43, pages 787, 788.*

The undisputed evidence shows that the claims of the brakemen, since June 30, 1946, are accruing at the rate of $514.90 per day (R. 542); that the potential liability of the railroad petitioners was $78,779.70 when the District Court on November 30, 1946, overruled (R. 75) their motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52); that the potential liability of these petitioners totaled $140,052.80 when the District Court on March 29, 1947, overruled (R. 183) the motion (R. 176-180) of the railroad petitioners to increase the amount of the temporary injunction bond from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect said petitioners against the payment of such costs and damages as they might incur or suffer if they or either of them were found to have been wrongfully enjoined or restrained; and that the potential liability of the railroad petitioners will be $329,536.00 on March 31, 1948.

Under these conditions the District Court, in requiring the train porters to give a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond and in overruling the motions of these petitioners to increase

the amounts of those bonds, did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure; or, if the District Court exercised any discretion, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c). These errors of the District Court were presented to and should have been corrected by the Circuit Court.

JURISDICTIONAL STATEMENT

This Court is authorized by Section 240 of the Judicial Code, as amended, (36 Stat. 1157, 43 Stat. 938; 28 U.S.C.A. Sec. 347) to review on certiorari the judgment of the Circuit Court. That statute reads in part as follows:

> "In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal" [28 U. S. C. A. Sec. 347(a)].

The judgment of the Circuit Court was rendered and entered on November 5, 1947 (R. 705-708). Within three months thereafter and on February 3, 1948, an order was made by the Honorable Wiley Rutledge, an Associate Justice of this Court, extending to and including April 1, 1948, the time in which this petition for a writ of certiorari may be filed, as authorized by Section 8 of the Act approved February 13, 1925 (43 Stat. 940; 28 U. S. C. A. Sec. 350).

This is a suit between citizens of different states and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 (R. 2) [Judicial Code, Sec. 24; 36 Stat. 1091; 28 U. S. C. A. Sec. 41(1)].

As a part of this jurisdictional statement, petitioners adopt the foregoing summary and short statement of the matter involved (pages 2-15). As therein shown, the Circuit Court erred (a) in its interpretation and application of the decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318;* (b) in its interpretation and application of the Railway Labor Act and the Norris-LaGuardia Act; and (c) in failing and refusing to correct the error of the District Court resulting from its failure and refusal to comply with Rule 65(c) of the Federal Rules of Civil Procedure which required the District Court to exact from the train porters security for the payment of such costs and damages as the railroad petitioners might incur or suffer should it be found that they have been wrongfully enjoined or restrained. These errors of the Circuit Court should be corrected.

QUESTIONS PRESENTED

For the convenience of the Court, this division of the petition has been subdivided into sections A, B and C; the question presented in each section has been placed at the end thereof; and each question is preceded by a résumé of the facts which give rise to such question.

A

In proceeding to withdraw the disputed work from the train porters, the railroad petitioners complied with the terms of the train porters' agreement (R. 233-234) and with the provisions of the Railway Labor Act (45 U.S.C.A. Sec. 152 Seventh and Sec. 156). These petitioners, therefore, had the legal right to cancel the train porters' agreement at midnight on June 30, 1946, and thereafter to negotiate a new agreement with the train porters which would expressly exclude the work in controversy. The Circuit Court so held:

> "The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698; *164 Fed. (2d) 5-6*].
>
> "The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152, Seventh, and cannot be questioned" [R. 705; *164 Fed. (2d) 9*].

Despite this holding, the Circuit Court also found and held:

> (a) That "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; *164 Fed. (2d) 7*];

(b) That "the controversy presented is a jurisdictional labor dispute within the purview of the Railway Labor Act * * * and a labor dispute within the meaning of the Norris-LaGuardia Act" [R. 698-699; *164 Fed. (2d) 6*];

(c) That "the question of interpretation and application of the labor contracts here is of the same intricacy and calls for the same special familiarity with railroad work and labor relations" as in the case of *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318* [R. 701; *164 Fed. (2d) 7*]; and

(d) That "the issuance of a temporary injunction was erroneous in view of the statutes and the decision of the Supreme Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318*" [R. 699; *164 Fed. (2d) 6*].

The train porters do not challenge the right of the railroad petitioners to cancel their contract and to negotiate a new contract which expressly excludes the work in controversy. They merely contend that this right should not be exercised by these petitioners because their action has been induced by the wrongful acts of the brakemen. The sole question, therefore, between the railroad petitioners and their train porters, is whether or not these petitioners should be enjoined because of the alleged wrongful acts of the brakemen.

This Court is called upon to decide (a) whether or not the courts have jurisdiction to determine this question or whether it presents a labor dispute which must be referred to the National Railroad Adjustment Board or to the National Mediation Board; and (b) whether, as held by the

Circuit Court, this case is controlled by the decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318.*

B

The Circuit Court found that the railroad petitioners proposed to cancel their contract with the train porters and to negotiate a new contract expressly excluding the work in controversy "after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156" [R. 698; *164 Fed. (2d) 6*]. And the Circuit Court held that "the legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; *164 Fed. (2d) 9*]. Notwithstanding this finding and holding, the Circuit Court also declared:

> "Insofar as the railroads propose to terminate the existing contract with the porters and to change their working conditions, the statute gives the porters the right to resort to the Mediation Board, 45 U. S. C. A. 155 * * *" [R. 703; *164 Fed. (2d) 8*].

Section 152 Seventh of Title 45 of the Code authorizes changes in rates of pay, rules, or working conditions, as embodied in agreements, provided such changes are made "in the manner prescribed in such agreements or in section 156 of this title". In attempting to withdraw the disputed work from the train porters, the railroad petitioners proceeded both "in the manner prescribed" in the train por-

ters' agreement (R. 233-234) and in the manner provided in Section 156. Changes made in accordance with an agreement are not subject to review by the National Mediation Board, and proposed changes under Section 156 may be made at the expiration of ten days from the termination of conferences, if there has been no request for or proffer of the services of the Mediation Board. In the instant case, conferences terminated on June 7, 1946 (R. 250) and services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

In light of this record, the Court is called upon to determine whether or not the Circuit Court erred in declaring that "the statute gives the porters the right to resort to the Mediation Board" [R. 703; *164 Fed. (2d) 8*].

C

The temporary restraining order (R. 16-18) which the train porters procured on June 24, 1946, and the temporary injunction (R. 160-163) which they procured on March 5, 1947, have compelled the railroad petitioners to continue using train porters, as well as other employees, in the performance of the disputed work since June 30, 1946. Except for those injunctive orders, these petitioners, at midnight on June 30, 1946, would have discontinued using train porters to perform said work (R. 250). Because train porters have been so used, claims of the brakemen, since June 30, 1946, are accruing at the rate of $514.90 per day (R. 542). The potential liability of the railroad petitioners was $78,779.70 when the District Court on November 30, 1946, overruled (R. 75)

their motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). The potential liability of these petitioners totaled $140,052.80 when the District Court on March 29, 1947, overruled (R. 183) the motion (R. 176-180) of these petitioners to increase the amount of the temporary injunction bond from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect the railroad petitioners against the payment of such costs and damages as they might suffer or incur if they or either of them were found to have been wrongfully enjoined or restrained. And the potential liability of the railroad petitioners will be $329,536.00 on March 31, 1948.

The insufficiency of these bonds and the errors of the District Court in connection therewith were urged by these petitioners in the Circuit Court. It was there contended that the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure; or, if the District Court exercised any discretion, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c). The Circuit Court did not pass upon these points. Except to state that the railroad petitioners complained of the terms upon which the temporary injunction was issued [R. 704; *164 Fed. (2d) 9*], that Court made no reference to the inadequacy of the temporary restraining order bond and the temporary injunction bond. The net result is that the railroad petitioners have been given a $500.00 bond to protect them against a potential liability of $329,536.00, as of March 31, 1948, which is increasing

at the rate of $514.90 per day, solely as a result of the temporary restraining order and the temporary injunction which the Circuit Court has declared never should have been issued.

This Court is called upon to determine whether or not the District Court failed and refused to comply with Rule 65(c) of the Federal Rules of Civil Procedure and, if so, whether that error of the District Court should have been corrected by the Circuit Court and whether it will now be corrected by this Court by an order requiring the train porters to give security, as required by Rule 65(c), which will protect these petitioners against the damages which they may suffer and incur as a result of the temporary restraining order and the temporary injunction.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

It is respectfully submitted that this petition for a writ of certiorari should be granted for each of the following reasons:

I.

The Circuit Court misinterpreted and misapplied the decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318*, and the Circuit Court misinterpreted and misapplied the provisions of the Railway Labor Act and the Norris-LaGuardia Act. These errors should be corrected.

After correctly holding that the railroad petitioners had and have the legal right to cancel their contract with the

train porters and to negotiate a new contract which expressly excludes the work in controversy, the Circuit Court erred in holding,—

(a) That "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; *164 Fed. (2d) 7*];

(b) That "the controversy presented is a jurisdictional labor dispute within the purview of the Railway Labor Act * * * and a labor dispute within the meaning of the Norris-LaGuardia Act" [R. 698-699; *164 Fed. (2d) 6*];

(c) That "the question of interpretation and application of the labor contracts here is of the same intricacy and calls for the same special familiarity with railroad work and labor relations" as in the case of *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318* [R. 701; *164 Fed. (2d) 7*]; and

(d) That "the issuance of a temporary injunction was erroneous in view of the statutes and the decision of the Supreme Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318*" [R. 699; *164 Fed. (2d) 6*].

In proceeding to withdraw the disputed work from the train porters, the railroad petitioners complied with the terms of the train porters' agreement (R. 233-234) and with the provisions of the Railway Labor Act (45 U.S.C.A. Sec. 152 Seventh and Sec. 156). These petitioners, therefore, had the legal right to cancel the train porters' contract at midnight on June 30, 1946, and thereafter to negotiate a new contract with the train porters which

would expressly exclude the work in controversy. The Circuit Court so held:

> "The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698, *164 Fed. (2d) 5-6*].
>
> "The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; *164 Fed. (2d) 9*].

The train porters do not challenge this right of the railroad petitioners. They merely contend that it should not be exercised because the action of these petitioners has been induced by the wrongful acts of the brakemen. The sole question, therefore, between the railroad petitioners and their train porters, is whether or not these petitioners should be enjoined because of the alleged wrongful acts of the brakemen. This is purely a question of law which only the Courts can answer. The power to answer it does not repose in the National Railroad Adjustment Board or in the National Mediation Board. The *Pitney case* is no authority for sending this question to either of those Boards. That case, as well as the *Southern Pacific, Texas and Pacific*, and *Santa Fe cases* before the Adjustment Board [Footnotes: R. 700; *164 Fed (2d) 7*], merely involved the proper interpretation of conflicting agreements. In none

of those cases, as in this case, had the railroad companies, "after due notice and in accord with the provisions of the Railway Labor Act" [R. 698; *164 Fed. (2d) 6*], sought to cancel one contract and to negotiate a new contract expressly eliminating the work in controversy. These facts distinguish the *Pitney case* from the case at bar and show why the *Pitney case* does not control this litigation and why there is no present labor dispute within the jurisdiction of the National Railroad Adjustment Board or the National Mediation Board.

II.

The Circuit Court erred in stating, with reference to the proposed action of the railroad petitioners, that "the statute gives the porters the right to resort to the Mediation Board" [R. 703; *164 Fed. (2d) 8*]. This error should be corrected.

The Circuit Court correctly found that the railroad petitioners proposed to cancel their contract with the train porters and to negotiate a new contract expressly excluding the work in controversy "after due notice and in accord with the provisions of the Railway Labor Act, 45 U.S.C.A. Sec. 152 Seventh and Sec. 156" [R. 698; *164 Fed. (2d) 6*]. Section 152 Seventh of that Act authorizes changes in rates of pay, rules, or working conditions, as embodied in agreements, provided such changes are made "in the manner prescribed in such agreements or in Section 156 of this title". In attempting to withdraw the disputed work from the train porters, the railroad petitioners proceeded both "in the manner prescribed" in the train porters' agree-

ment (R. 233-234) and in the manner provided in Section 156. Changes made in accordance with an agreement are not subject to review by the National Mediation Board, and proposed changes under Section 156 may be made at the expiration of ten days from the termination of conferences, if there has been no request for or proffer of the services of the Mediation Board. In the instant case, conferences terminated on June 7, 1946 (R. 250) and the services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560). It necessarily follows that the train porters have no right to resort to the National Mediation Board.

III.

The Circuit Court failed and refused to correct the error of the District Court in its failure and refusal to comply with Rule 65(c) of the Federal Rules of Civil Procedure. This error should be corrected.

Rule 65(c) of the Federal Rules of Civil Procedure prohibits the issuance of a temporary restraining order or a temporary injunction except upon the giving of security by the applicant "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained". While the security under the rule shall be "in such sum as the court deems proper", the Court must exercise "his sound discretion, which discretion, however, is a legal and not an arbitrary one", and the Court must not lose sight of the purpose of the bond which is "to insure with all practicable certainty" that the person enjoined "may sustain no ulti-

mate loss, in case the injunction should be dissolved", *Corpus Juris Secundum, Injunctions, Vol. 43, pages 787, 788.*

The undisputed evidence shows that the claims of the brakemen, since June 30, 1946, are accruing at the rate of $514.90 per day (R. 542); that the potential liability of the railroad petitioners was $78,779.70 when the District Court on November 30, 1946, overruled (R. 75) their motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52); that the potential liability of these petitioners totaled $140,052.80 when the District Court on March 29, 1947, overruled (R. 183) the motion (R. 176-180) of the railroad petitioners to increase the amount of the temporary injunction bond from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect said petitioners against the payment of such costs and damages as they might incur or suffer if they or either of them were found to have been wrongfully enjoined or restrained; and that the potential liability of the railroad petitioners will be $329,536.00 on March 31, 1948.

Under these conditions the District Court, in requiring the train porters to give a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond and in overruling the motions of these petitioners to increase the amounts of those bonds, did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure; or, if the District Court exercised any discretion, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by

Rule 65(c). These errors of the District Court were presented to and should have been corrected by the Circuit Court.

WHEREFORE, petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court in the three consolidated causes, Nos. 13564 and 13565 entitled "Missouri-Kansas-Texas Railroad Company, et al. versus A. Phillip Randolph, et al.", and No. 13566 entitled "R. D. Wood, et al. versus A. Phillip Randolph, et al." to the end that said consolidated causes may be reviewed and determined by this Court as provided by the statutes of the United States; that the judgment of the Circuit Court which ordered the dissolution of the temporary injunction against these petitioners be affirmed; that the Court reverse that portion of the judgment of the Circuit Court which holds or implies that this controversy should be taken to the National Railroad Adjustment Board or to the National Mediation Board; that the Court declare that there is no dispute between these petitioners and their train porters which can be taken either to the National Railroad Adjustment Board or the National Mediation Board; that the Court overrule the action of the District Court and the Circuit Court in refusing and failing to require the train porters to give ade-

quate security as required by Rule 65(c) of the Federal Rules of Civil Procedure; that the Court enter an order requiring the train porters to give such security; and for all other and further relief to which petitioners may be entitled.

Dated March 30, 1948.

Respectfully submitted,

C. S. BURG,

CARL S. HOFFMAN,
Railway Exchange Bldg.,
St. Louis, Mo.

G. H. PENLAND,

M. E. CLINTON,
M-K-T Bldg.,
Dallas, Texas.

ELLISON A. NEEL,
1015 Commerce Bldg.,
Kansas City, Mo.,
Counsel for Petitioners, Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas.

No.....

In the

Supreme Court of the United States

OCTOBER TERM, 1947

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Petitioners,

v.

A. PHILLIP RANDOLPH, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

As permitted by Rule 38, petitioners attach this supporting brief to their petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the District Court is reported in *68 F. Supp. 1007*. The opinion of the Circuit Court is reported in *164 F. (2d) 4*, Pamphlet Advance Sheet No. 1, dated December 22, 1947.

GROUNDS OF JURISDICTION

This Court is authorized by Section 240 of the Judicial Code, as amended, (36 Stat. 1157, 43 Stat. 938; 28 U.S.C.A.

Sec. 347) to review on certiorari the judgment of the Circuit Court. That statute reads in part as follows:

> "In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal" [28 U. S. C. A. Sec. 347(a)].

The judgment of the Circuit Court was rendered and entered on November 5, 1947 (R. 705-708). Within three months thereafter and on February 3, 1948, an order was made by the Honorable Wiley Rutledge, an Associate Justice of this Court, extending to and including April 1, 1948, the time in which this petition for a writ of certiorari may be filed, as authorized by Section 8 of the Act approved February 13, 1925 (45 Stat. 940; 28 U. S. C. A. Sec. 350).

This is a suit between citizens of different states and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 (R. 2) [Judicial Code, Sec. 24; 36 Stat. 1091; 28 U. S. C. A. Sec. 41(1)].

As hereinafter shown, the Circuit Court erred (a) in its interpretation and application of the decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318;* (b) in its interpretation and application of the Railway Labor Act and the Norris-LaGuardia Act; and (c) in failing and refusing to correct the error of the District Court resulting from its failure

and refusal to comply with Rule 65(c) of the Federal Rules of Civil Procedure which required the District Court to exact from the train porters security for the payment of such costs and damages as the railroad petitioners might incur or suffer should it be found that they have been wrongfully enjoined or restrained. These errors of the Circuit Court should be corrected.

STATEMENT OF THE CASE

Nature of the Suit

This is a suit for an injunction (Complaint, R. 2-16; Amended, R. 34-35, 74-75).

Jurisdiction is predicated upon diversity of citizenship and the requisite amount (R. 2).

The complaint was filed on June 24, 1946 (R. 16) by A. Phillip Randolph, International President of the Brotherhood of Sleeping Car Porters, Train, Chair Car, Coach Porters and Attendants; other officers of the Brotherhood; William P. Orr and six other individuals; the above mentioned Brotherhood; and Local Train Porters Union No. 3 (R. 1), as a class action on behalf of a group known as "Train Porters", employees of defendants Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas (R. 3).

Defendants below were Missouri-Kansas-Texas Railroad Company, a Missouri corporation; Missouri-Kansas-Texas Railroad Company of Texas, a corporation of the State of Texas; E. R. Bryan, General Chairman of the Brotherhood of Railroad Trainmen on the lines of railroad operated by

the defendant railroad companies; other officers of the Brotherhood and its local lodges; and the Brotherhood of Railroad Trainmen (R. 1). It was alleged that the defendants, except the railroad companies, represent a group known as "Railroad Trainmen", employees of defendants Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas (R. 3).

The purpose of the suit is to compel the railroad defendants to continue using train porters, as well as other employees, in the performance of the following duties relating to train movements:

> "(1) Inspection of cars and trains and test signal and brake apparatus for safety of train movement;
>
> "(2) The use of hand and lamp signals for the protection and movement of trains and engines, including necessary flag protection on the head end of trains or through blocks;
>
> "(3) Opening and closing switches and derails for switching and for the movement of trains and engines en route, and at some terminals;
>
> "(4) Coupling and uncoupling cars and engines and the hose and chain and attachments thereof en route and at some passenger terminals;
>
> "(5) Pick up, set out, place and switch loaded and occupied passenger cars en route and at some passenger terminals;
>
> "(6) Read the Conductors train orders and familiarize himself with them to determine where opposing trains are to be met or passed and observe position of all order signals and see that train orders affecting the movement of trains are picked up en route" (R. 6, 13).

The railroad defendants filed a cross-claim against their co-defendants and the plaintiffs in this action seeking a judgment declaring, among other things, the rights and other legal relations and obligations of all of the parties (R. 87-93).

Factual Background

In order that the Court may fully understand the issues in this case, petitioners set forth the essential facts antedating this litigation.

Conductors, brakemen, train porters, and other employees of the railroad defendants now perform and for many years have performed interchangeably for said defendants the work in controversy (R. 537-540).

Neither the current agreements (R. 229-234, 252-295) nor the former agreements (R. 225-229; Exhibits A to F to the Stipulation of Facts, omitted in printing, R. 220, 653-655) between the railroad defendants and their train porters, conductors and brakemen, specify who shall perform such work.*

By letter dated April 1, 1946 (R. 239-241), the Brotherhood of Railroad Trainmen protested the use by the railroad defendants of any employees other than brakemen in the performance of said work, stating:

> "Unless the practice of requiring or permitting these employees to perform brakemen's duties is discontinued within ten (10) days from the date of this

* The Circuit Court so found: "* * * neither the agreement between the railroad companies and the train porters, nor that between the railroad trainmen and the railroads, states in so many words that the railroads agree to give the work in question to either of the groups or both" [R. 700; 164 F. (2d) 7].

letter, claim will be filed for each available brakeman on M-K-T Lines first out on extra board at time such train is run on which this service is performed by other than a qualified brakeman, on the same basis as though such brakeman was used to perform all of the brakemen's duties and work on such passenger trains" (R. 240-241).

Prior to making this protest, the Brotherhood of Railroad Trainmen had procured from the First Division of the National Railroad Adjustment Board four awards on other railroads to the effect that those companies violated their agreements with the brakemen when they permitted train porters to perform work similar to the work now in controversy, to wit:

Award No. 5906, Docket 9898, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit X to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 5907, Docket 9899, dated July 28, 1941, involving the Southern Pacific Lines in Texas and Louisiana (Exhibit Y to Stipulation of Facts, not printed; R. 220, 223, 655);

Award No. 6640, Docket 7400, dated April 20, 1942, involving The Atchison, Topeka and Santa Fe Railway Company—Eastern and Western Lines (Exhibit W to Stipulation of Facts, not printed; R. 220, 223, 655); and

Award No. 7251, Docket 14777, dated September 3, 1942, involving The Texas and Pacific Railway Company (Exhibit Z to Stipulation of Facts, not printed; R. 220, 223, 655).

In Awards 5906, 5907 and 7251, the National Railroad Adjustment Board, without a Referee, sustained the com-

plaint or claim "without retroactive adjustment in compensation"; but in Award 6640, the Board, by Referee James B. Riley, after holding that the use of porters violated the seniority rights of brakemen, declared:

> "It follows that protest and specific claim should be sustained. Claim that like settlement shall be made in all instances of similar nature now on file is likewise sustained" (page 18).

Confronted with these awards and the positive declaration of the Brotherhood of Railroad Trainmen that claims would be filed if train porters continued to perform any of this work (R. 240-241), the railroad defendants decided to discontinue using train porters for this service. Accordingly, the railroad defendants gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156). The original date of May 16, 1946 (R. 242), on which said use of train porters was to have been discontinued, was postponed (R. 246) and, at the final conference on June 7, 1946, was changed to June 30, 1946 (R. 250). The services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

Proceedings in the District Court

The train porters commenced this suit on June 24, 1946 (R. 16). Among other things, it was alleged that the train porters, both by contract and custom, for more than sixty years (R. 7) have performed the work in controversy

(R. 6). Plaintiffs also alleged that the railroad defendants, unless enjoined and restrained (R. 12), would take said work away from the train porters because of "fraud, duress, threats and undue influence" exerted and threatened to be exerted by the Railroad Trainmen (R. 5).

The train porters were fully informed of the claims which the Brotherhood of Railroad Trainmen had threatened to file against the railroad defendants (R. 10) and, in further support of their action, the train porters asserted that the Railroad Trainmen, unless restrained and enjoined, would "carry out the aforesaid threats", would "continue to bring pressure upon the railroad companies", and would "continue to subject them to such duress and threats that the railroad companies are helpless not to cancel said contract" (R. 12).

Upon the verified complaint (R. 2-16), the District Court granted a temporary restraining order on June 24, 1946, which declared:

> "That the Brotherhood of Railroad Trainmen and all the officers and members thereof, be restrained and enjoined from seeking to enforce their demands described in the complaint, by claims and suits against the railroad companies or otherwise, and be enjoined from interfering with the contractual relations between the Train Porters and the railroad defendants, and from in any manner seeking to cause the railroad companies to repudiate and violate the contract and custom described in the complaint" (R. 17); and
>
> "That the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and their agents, officers and representatives, be and they are hereby restrained and enjoined from violating the terms of the contract pleaded in

the complaint, and of the agreed custom therein described, and are enjoined from disturbing the status of plaintiffs as it now exists under said contract and custom, and from taking from the plaintiffs the performance of the duties performed by the Trail (Train) Porters as described in said complaint, and be enjoined from complying with the demands of the Brotherhood of Railroad Trainmen in the premises" (R. 17).

In support of the temporary restraining order, plaintiffs posted a $500.00 bond (R. 18-19).

On September 10, 1946, the railroad defendants filed a motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). After hearing evidence on the motion (R. 199-210), the District Court handed down a Memorandum Opinion on October 28, 1946 (R. 634-639), directing counsel to prepare an order overruling the motion of the railroad defendants to increase the amount of the temporary restraining order bond (R. 639). In reaching this decision, the District Court was not guided by the evidence of damages which the railroad defendants might suffer or incur because of the temporary restraining order, as contemplated by Rule 65(c) of the Federal Rules of Civil Procedure, but by the Court's belief that plaintiffs were entitled to injunctive relief. The Court said:

> "In this case, upon the pleadings, upon the arguments of counsel, and upon all of the assumed facts, the plaintiffs are clearly and unquestionably entitled to a temporary restraining order and temporary injunction. A valid and subsisting contract held by them is admittedly threatened and it is not denied but that they would suffer irreparable damage.

"In view of the admitted facts, the plaintiffs are not wrongfully enjoining the corporate defendants and the individual defendants. At this early stage of the proceeding, and upon the admitted facts, the plaintiffs have the undeniable right to restrain the abrogation or breach of their contract and to restrain the individual defendants from an endeavor to induce its abrogation or breach. Under such circumstances the plaintiffs ought not to be required to pledge additional security for damages that might and doubtless will accrue to the corporate defendants, but for which the plaintiffs would in no wise be responsible or at fault" (R. 639).

On November 9, 1946, the railroad defendants filed a motion (R. 61-68) to modify and vacate portions of the Memorandum Opinion dated October 28, 1946, pointing out the error of the District Court in refusing to increase the amount of the temporary restraining order bond solely because the Court was of the opinion that plaintiffs were entitled to an injunctive order (R. 66-68). In reply, the District Court on November 22, 1946, filed a Supplemental Memorandum Opinion (R. 640-646) to the effect that the amount of a bond is discretionary with the Court (R. 643) and that the motion to increase the bond should be denied because (1) the damages would have accrued without the issuance of the temporary restraining order (R. 644-645), and (2) a bond should not be required for the purpose of paying debts (R. 643). Consequently, the District Court erroneously held that:

"The statute and the rule providing the security in injunctive proceedings did not contemplate damages of the character involved or discussed in this proceeding" (R. 645).

Accordingly, the District Court on November 30, 1946 (R. 75), entered an order overruling the motion of the railroad defendants to increase the amount of the temporary restraining order bond (R. 42-52) and their motion to modify and vacate portions of the Memorandum Opinion dated October 28, 1946 (R. 634-639).

By successive orders of the District Court (R. 19, 35, 75), the temporary restraining order was kept in effect until issuance of a temporary injunction on March 5, 1947 (R. 160-163) which followed hearings on January 20, 21, 22, 1947 (R. 86, 107, 210-633). The temporary injunction ordered and adjudged:

> "That the Brotherhood of Railroad Trainmen and all the members thereof now engaged in working for the defendant railroad companies be and they hereby are restrained and enjoined from seeking to enforce their said demands by claims and suits against the railroad companies, defendants; and they are further enjoined and restrained from coercing said railroad companies by threatening to file or by filing claims arising from the work performed by the plaintiffs; and they are further enjoined and restrained from interfering in any way whatever with the contractual relations, as above stated, between the Train Porters and the Railroad Companies, by inducing or coercing said Railroad Companies to repudiate, abrogate, cancel or violate their contract obligations with the plaintiffs, Train Porters" (R. 162-163); and
>
> "That the defendant railroad companies be and they hereby are temporarily enjoined and restrained from violating the terms of the contract hereinbefore mentioned and from disturbing the status of the plaintiffs under said contract with all modifications thereof, including customs and habits indulged and approved; and the said railroad companies are en-

joined from taking from the plaintiffs the performance of the duties heretofore rendered by them and now being rendered by them pursuant to said contract; and the said railroad companies are further enjoined from complying with or yielding to demands of the Brotherhood of Railroad Trainmen" (R. 162).

Also included in the temporary injunction was an order that:

"plaintiffs enter into an obligation in the way of security in the sum of Five Hundred ($500.00) Dollars for the payment of such costs and damages as may be incurred or suffered by any party who may have been found to have been wrongfully enjoined or restrained hereby, or that the bond or security heretofore given on the temporary restraining order to the same effect and for the same purposes be continued as security herein" (R. 163).

On March 20, 1947, the railroad defendants filed a motion to dissolve the temporary injunction (R. 170-175) on the grounds (1) that there is no legal basis for the injunction since no cause of action is either pleaded or proved against the railroad defendants (R. 171-172), and (2) the $500.00 bond, under the undisputed evidence, does not satisfy those provisions of Rule 65(c) of the Federal Rules of Civil Procedure which expressly prohibit the issuance of a temporary injunction unless and until the Court has required the applicant therefor to give security conditioned upon "the payment of such costs and damages as may be incurred or suffered by any party" who may be found to have been wrongfully enjoined and restrained (R. 172-174).

Subject to their motion to dissolve, the railroad defendants also filed another motion on March 20, 1947, asking that the amount of the temporary injunction bond be increased from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect said defendants against the payment of such costs and damages as they might suffer or incur if they, or either of them, are found to have been wrongfully enjoined or restrained (R. 176-180).

The motion of the railroad defendants to dissolve the temporary injunction and their alternative motion to increase the amount of the temporary injunction bond were overruled on March 29, 1947 (R. 183).

Potential Damages

By letter dated April 1, 1946, the Brotherhood of Railroad Trainmen threatened to commence the filing of claims on behalf of individual brakemen if the railroad defendants did not, within ten days, discontinue using employees other than brakemen in the performance of the work in controversy (R. 239, 240-241).

Between April 11, 1946, and June 24, 1946, when this suit was filed and the temporary restraining order was issued (R. 16, 19), 688 claims totaling $6,447.00 had been filed against the railroad defendants (R. 540) and their potential liability for that period was $38,617.50 (R. 542).

A hearing was held on September 14, 1946 (R. 200) on the motion of the railroad defendants to increase the amount of the temporary restraining order bond from

$500.00 to $75,000.00 (R. 42-52). According to the undisputed evidence, claims of the brakemen against the railroad defendants were then accruing at an approximate rate of $520.00 per day (R. 201). Subsequent to the hearing and before the Court ruled on the motion, a check of operations was made during the month of October 1946. It revealed that the claims of the brakemen were accruing at the rate of $514.90 per day (R. 73). An affidavit to that effect by A. F. Winkel, an officer for the railroad defendants (R. 72), was filed on November 16, 1946 (R. 73), fourteen days before the Court on November 30, 1946 (R. 75) overruled the railroads' motion to increase the amount of the temporary restraining order bond.

Had the temporary restraining order not been issued, the railroad defendants, at midnight on June 30, 1946, would have discontinued using train porters to perform the work in controversy (R. 250). Because of the temporary restraining order, the railroad defendants continued to permit train porters, as well as other employees, to do the work. Claims of the brakemen are accruing on each day that train porters perform the work (R. 240-241, 208-209). At the rate of $514.90 per day, said claims totaled $78,779.70 for the period July 1, 1946, to November 30, 1946, when the Court overruled the motion to increase the amount of the temporary restraining order bond (R. 75).

Mr. Winkel was a witness at the hearing on plaintiffs' application for a temporary injunction on January 22, 1947 (R. 543). He testified that the railroad defendants

were being subjected to a daily potential liability of $514.90 (R. 542). At that rate, said claims totaled $127,695.20 for the period July 1, 1946, to March 5, 1947, when the temporary injunction was issued upon plaintiffs' giving a $500.00 bond (R. 160-163), and they totaled $140,052.80 when the Court on March 29, 1947, overruled the motion of the railroad defendants to increase the amount of the temporary injunction bond (R. 183).

As a result of the issuance of the temporary restraining order and the temporary injunction, the potential liability of the railroad defendants will amount to $329,536.00 on March 31, 1948, and such potential liability thereafter will increase at the rate of $514.90 per day (R. 542).

Proceedings in the Circuit Court

Three appeals, Civil Actions Nos. 13564, 13565 and 13566, were prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit and were consolidated by order of that Court dated May 26, 1947.

In Civil Action No. 13564, the railroad defendants appealed (R. 156-157) from those portions of the order of the District Court dated November 30, 1946 (R. 74-75), which (a) overruled the railroads' motion to increase the amount of the temporary restraining order bond (R. 42-50), and (b) overruled the railroads' motion (R. 61-68) to modify and partially vacate the Memorandum Opinion of the District Court dated October 28, 1946 (R. 634-639).

In Civil Action No. 13565, the railroad defendants appealed (R. 187-189) from those portions of the order of the

District Court dated March 5, 1947 (R. 160-163), which granted a temporary injunction against the railroads, and from the order of the District Court dated March 29, 1947 (R. 183), which (a) overruled the railroads' exceptions to the form of the temporary injunction (Original Record 187-193; Omitted in Printing, R. 649, 651-652), (b) overruled the railroads' motion to dissolve the temporary injunction (R. 170-175), and (c) overruled the railroads' alternative motion to increase the amount of the temporary injunction bond (R. 176-180).

In Civil Action No. 13566, the Brotherhood of Railroad Trainmen and other defendants in the District Court (R. 184-185) appealed from the order of March 5, 1947, which granted a temporary injunction against them (R. 160-163).

All appeals were presented on a single record.

In the Circuit Court the railroad appellants urged the following points:

> "1. The temporary injunction should be dissolved because plaintiffs neither pleaded nor proved a cause of action against the railroad defendants".
>
> "2. The railroad defendants had the legal right to terminate their agreement with the train porters at midnight on June 30, 1946, and thereafter to negotiate a new agreement with their train porters which would exclude the work in controversy".
>
> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the

issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".

"4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction" (Brief, pages 20-23).

The opinion of the Circuit Court (R. 695-705) is reported in *164 Fed. (2d) 4-9*, Pamphlet Advance Sheet No. 1, dated December 22, 1947. In accordance with that opinion, the Court remanded the causes to the District Court with direction to dissolve the temporary injunction and for further proceedings in accordance with that opinion (R. 708). A petition for rehearing filed by the train porters (R. 709-713) was denied (R. 715); and on motion by the train porters (R. 715-716), the mandate was stayed pending application for a writ of certiorari (R. 718-719).

The Brotherhood of Railroad Trainmen and its officers contended in the Circuit Court, as they did in the District Court, that—

> "the facts pleaded as well as the facts shown in evidence in this case, disclose that the controversy presented is a jurisdictional labor dispute within the purview of the Railway Labor Act, 45 U. S. C. A. 151, et seq., and a labor dispute within the meaning of the Norris-LaGuardia Act, 29 U. S. C. A. 101, et seq." [R. 698; *164 Fed. (2d) 6*].

The Brotherhood of Railroad Trainmen and its officers also contended,—

> "that the District Court should not have undertaken to interpret the agreements of the passenger train porters or of the railroad trainmen with the railroads for the purpose of settling by injunctional orders or decree, the dispute as to whether one or both of the two classes of employees, the train porters and the trainmen, should perform the work in question" [R. 698-699; *164 Fed. (2d) 6*]; and that,—
>
> "the court should have stayed exercise of its power to issue injunctional orders and should have relegated the parties to the tribunals specifically provided by Congress in the Railway Labor Act for mediation and for determining the interpretation and application of collective bargaining contracts such as are shown to be involved in this case, in order to finally settle the labor dispute arising out of them, and that the issuance of the temporary injunction in the first instance was erroneous" [R. 699; *164 Fed. (2d) 6*].

Sustaining these contentions, the Circuit Court held that,—

> "the issuance of the temporary injunction was erroneous in view of the statutes and the decision of the Supreme Court in Order of Railway Conductors v.

Pitney, 326 U. S. 561, 66 S. Ct. 322, 325, 90 L. Ed. 318" [R. 699; *164 Fed. (2d) 6*].

The Circuit Court also rejected the plea of the train porters that the injunction sought is not within the purview of the Federal Acts because the trainmen were guilty of "wrongful conduct amounting to tort, committed and threatened against the railroads to compel the railroads to breach or cancel their contracts with the porters". The Court stated that "examination of the record convinces that there was no substantial evidence tending to show that the defendant trainmen have committed or threatened any such actionable tort" [R. 701; *164 Fed. (2d) 7-8*].

The Circuit Court also ordered a dissolution of the temporary injunction against the railroad companies because:

> "* * * the temporary injunction, insofar as it runs against the railroads, was induced solely by the court's conclusion that the trainmen were guilty of past and threatened tortious conduct, wrongfully coercing the railroads into their proposed action, which it considered enjoinable. It is clear from the record that no injunction would have been issued against the railroads except upon that consideration and such was the theory of the plaintiffs' case as against the railroads. *The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned.* Our conclusion that there was no tortious conduct on the part of the trainmen justifying the temporary injunction against them therefore necessitates that it be dissolved as to the railroads as prayed in their appeal" (Our italics) [R. 704-705; *164 Fed. (2d) 9*].

In this connection, the Circuit Court found:

> "The railroads were about to accede to the demands of the trainmen and intended, *after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156*, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" (Our italics) [R. 697-698; *164 Fed. (2d) 5-6*].

The Circuit Court thus sustained Points 1 and 2 urged by the railroad appellants, reading as follows:

> "1. The temporary injunction should be dissolved because plaintiffs neither pleaded nor proved a cause of action against the railroad defendants".

> "2. The railroad defendants had the legal right to terminate their agreement with the train porters at midnight on June 30, 1946, and thereafter to negotiate a new agreement with their train porters which would exclude the work in controversy".

But the Circuit Court did not pass upon said appellants' Points 3, 4, 5, and 6, to wit:

> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".

> "4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".

"6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction".

The net result is that the railroad petitioners have been given a $500.00 bond to protect them against a potential liability of $329,536.00, as of March 31, 1948, which is increasing at the rate of $514.90 per day, solely as a result of the temporary restraining order and the temporary injunction which the Circuit Court has declared never should have been issued.

SPECIFICATION OF ASSIGNED ERRORS

I.

The Circuit Court erred in holding that "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; 164 Fed. (2d) 7].

II.

The Circuit Court erred in holding that "the controversy presented is a jurisdictional labor dispute within

the purview of the Railway Labor Act * * * and a labor dispute within the meaning of the Norris-LaGuardia Act" [R. 698-699; 164 Fed. (2d) 6.]

III.

The Circuit Court erred in holding that "the question of interpretation and application of the labor contracts here is of the same intricacy and calls for the same special familiarity with railroad work and labor relations" as in the case of Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318 [R. 701; 164 Fed. (2d) 7].

IV.

The Circuit Court erred in holding that "the issuance of a temporary injunction was erroneous in view of the statutes (Railway Labor Act and Norris-LaGuardia Act) and the decision of the Supreme Court in Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318" [R. 699; 164 Fed. (2d) 6].

V.

The Circuit Court erred in stating that "insofar as the railroads propose to terminate the existing contract with the porters and to change their working conditions, the statute gives the porters the right to resort to the Mediation Board" [R. 703; 164 Fed. (2d) 8].

VI.

The Circuit Court erred, as did the District Court, in failing and refusing to require the train porters to give

security, as required by Rule 65(c) of the Federal Rules of Civil Procedure, in a sum sufficient to protect the railroad petitioners from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction.

ARGUMENT

Preliminary Statement

These factors influenced the decision of the railroad companies to withdraw the work in controversy from their train porters:

1. Four Awards of the First Division of the National Railroad Adjustment Board against the Southern Pacific, Texas and Pacific, and Santa Fe, holding:

(a) That similar work belongs to brakemen;

(b) That the use of train porters, in the performance of such work, is a violation of the seniority rights of brakemen;

(c) That the claims and complaint of the brakemen should be sustained (Exhibits W, X, Y and Z to Stipulation of Facts, not printed; R. 220, 223, 655; Exhibit W, pages 1-2, 18; Exhibit X, pages 1, 23; Exhibit Y, pages 1, 35; Exhibit Z, pages 1, 28).

2. The action of the First Division of the National Railroad Adjustment Board, by Referee James B. Riley, in sustaining against the Santa Fe money claims of four individual brakemen and claims "in all other instances of similar nature now on file" (Exhibit W, pages 1, 18).

3. The positive threat of the Brotherhood of Railroad Trainmen to file similar claims against these petitioners if they continued to use train porters in performing the disputed work (R. 240-241, 207-209, 615).

4. The decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561*, in which it was held that the National Railroad Adjustment Board should construe the contracts of two opposing unions and decide which group of employees should perform the disputed work.

5. The inability of the railroad petitioners to bring the brakemen and the train porters before the same Division of the National Railroad Adjustment Board [R. 518-520; 45 U. S. C. A. Sec. 153(h)] for a single and conclusive decision, and the possibility that the First Division would render an award in favor of the brakemen against the railroad petitioners while the Fourth Division would render an award in favor of the train porters against the railroad petitioners, thus creating a chaotic condition and impossible situation.

6. The holding of this Court that an award of the National Railroad Adjustment Board is more than an advisory opinion, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 720-721*, and the tendency of this Court to sustain an award of the Board upon a "factual question" which "is intricate and technical" because rendered by "an agency especially competent and specifically designated to deal with it", *Order of Railway Conductors v. Pitney, 326 U. S. 561, 567*.

7. The inability of the railroad petitioners to initiate an action testing the validity of an adverse award because the right of review, at the instigation of a railroad company, is not granted by the Railway Labor Act, *Washington Terminal Co. v. Boswell, 124 Fed. (2d) 235, 240;* affirmed by divided Court, *319 U. S. 732.*

8. The knowledge that the Brotherhood of Railroad Trainmen would resort to a strike vote to enforce an award against these petitioners (R. 619), as it did in the Southern Pacific case (R. 617-618), instead of suing on the award as contemplated by the Railway Labor Act [45 U. S. C. A. Sec. 153(p)].

Argument Under Assignments of Error I, II, III and IV

Assignment of Error I—(Restated)

The Circuit Court erred in holding that "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; 164 Fed. (2d) 7].

Assignment of Error II—(Restated)

The Circuit Court erred in holding that "the controversy presented is a jurisdictional labor dispute within the purview of the Railway Labor Act * * * and a labor dispute within the meaning of the Norris-LaGuardia Act" [R. 698-699; 164 Fed. (2d) 6.]

Assignment of Error III—(Restated)

The Circuit Court erred in holding that "the question of interpretation and application of the labor contracts here is of the same intricacy and calls for the same special familiarity with railroad work and labor relations" as in the case of Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318 [R. 701; 164 Fed. (2d) 7].

Assignment of Error IV—(Restated)

The Circuit Court erred in holding that "the issuance of a temporary injunction was erroneous in view of the statutes (Railway Labor Act and Norris-LaGuardia Act) and the decision of the Supreme Court in Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318" [R. 699; 164 Fed. (2d) 6].

Assignments of Error I, II, III and IV are related and will be considered together.

Neither the agreement between the railroad petitioners and their train porters (R. 229-234) nor the agreement between these petitioners and their brakemen (R. 252-295) specify who shall perform the work in controversy* although each group bases its claims upon those respective agreements. Therefore, having concluded to withdraw such work from the train porters, for the reasons stated in the foregoing preliminary statement, these petitioners gave notices to, and held hearings and conferences with, the

* The Circuit Court so found: "* * * neither the agreement between the railroad companies and the train porters, nor that between the railroad trainmen and the railroads, states in so many words that the railroads agree to give the work in question to either of the groups or both" [R. 700; 164 F. (2d) 7].

train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act [45 U. S. C. A. Sec. 152 Seventh and Sec. 156].

The Railway Labor Act is part of Title 45 of the United States Code Annotated. Section 152 Seventh of that Title reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title".

It is clear from this statute that the railroad petitioners were authorized to withdraw the disputed work from the train porters, even though the right to such work were embodied in an agreement—which is denied, provided such withdrawal was made either in accordance with the train porters' agreement or in accordance with the provisions of Section 156 of Title 45.

The current agreement with the train porters became effective December 1, 1928 (R. 229). The second paragraph of Article XI of that agreement reads in part as follows:

> "These rules and regulations shall remain in full force and effect * * * until written fifteen (15) days' notice is served, setting forth any change that is desired by either the railway or employes, and a hearing will be given within fifteen (15) days after receipt of notice" (R. 233-234).

Section 156 of Title 45 of the Code reads as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an in-

tended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board".

As heretofore stated, these petitioners gave notices to, and held hearings and conferences with, the train porters (R. 241-251) as contemplated by the current agreement (R. 233-234) and required by the Railway Labor Act.

By telegram dated April 12, 1946 (R. 241), these petitioners notified T. D. McNeal, representative of the train porters (R. 466-467), that the Brotherhood of Railroad Trainmen was protesting the use of train porters to perform the work in controversy. By letter dated April 15, 1946 (R. 242), petitioners notified McNeal of their intention to cancel the train porters' agreement effective May 16, 1946, and to negotiate a new agreement. A conference was arranged for May 4, 1946 (R. 244) but postponed to and held on May 7, 1946 (R. 245, 246). No agreement was reached, the conference was adjourned, and the effective date for cancellation of the agreement was post-

poned (R. 246). Another conference was held on May 22, 1946, and adjourned to a later date to be mutually agreed upon (R. 248). The final conference was held on June 7, 1946 (R. 250). Verbally and by letter of that date, petitioners notified the train porters that the agreement would be cancelled at midnight on June 30, 1946, and that petitioners were willing to negotiate another agreement which would expressly exclude the work in controversy (R. 250-251). Services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560).

Having complied with the terms of the train porters' agreement (R. 233-234) and with the provisions of the Railway Labor Act (45 U. S. C. A. Sec. 152 Seventh and Sec. 156) these petitioners had the legal right to cancel the train porters' agreement at midnight on June 30, 1946, and thereafter to negotiate a new agreement with the train porters which would expressly exclude the work in controversy. The Circuit Court so held:

> "The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698; *164 F. (2d) 5-6*].

> "The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; *164 F. (2d) 9*].

The porters do not challenge this right of petitioners. They merely contend that the right should not be exercised because the action of petitioners has been induced by the wrongful acts of the trainmen. The sole question, therefore, as between these petitioners and their train porters, is whether or not petitioners should be enjoined from exercising this right because their action has been induced by the alleged wrongful acts of the brakemen. This is purely a question of law which only the courts can answer. Power to answer it does not repose in the National Railroad Adjustment Board or in the National Mediation Board. The Circuit Court erred, therefore, in holding that "the real dispute here involved" is "whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" [R. 700; *164 F. (2d) 7*], and the Circuit Court erred in sending the parties to the National Railroad Adjustment Board under the doctrine announced by this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318* [R. 699-701; *164 F. (2d) 6-7*].

The *Pitney case*, as well as the *Southern Pacific, Texas and Pacific*, and *Santa Fe cases* before the Adjustment Board [Footnotes: R. 700; *164 F. (2d) 7*], merely involved the proper interpretation of conflicting agreements. In none of those cases, as in this case, had the railroad companies, "after due notice and in accord with the provisions of the Railway Labor Act" [R. 698; *164 F. (2d) 6*], sought to cancel one contract and to negotiate a new contract expressly eliminating the work in controversy. These facts distinguish the *Pitney case*, and the other cases, from

the case at bar and show why there is no present dispute within the jurisdiction of the National Railroad Adjustment Board.

Argument Under Assignment of Error V

Assignment of Error V—(Restated)

The Circuit Court erred in stating that "insofar as the railroads propose to terminate the existing contract with the porters and to change their working conditions, the statute gives the porters the right to resort to the Mediation Board" [R. 703; 164 Fed. (2d) 8].

There is no dispute or controversy which the train porters can take to the National Mediation Board. As shown in the preceding argument under Assignments of Error I, II, III and IV, these petitioners sought to cancel the contract with their train porters and to negotiate a new contract expressly including the work in controversy both "in the manner prescribed in such agreement" and under Section 156 of Title 45—the Railway Labor Act (R. 233-234; 45 U. S. C. A. Sec. 152 Seventh). Changes made as provided in an agreement are not subject to review by the National Mediation Board, and proposed changes under Section 156 may be made at the expiration of ten days from the termination of conferences, if there has been no request for or proffer of the services of the Mediation Board. In the instant case, services of the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560). It follows that the train porters have no right to resort to the National Mediation Board.

Argument Under Assignment of Error VI

Assignment of Error VI—(Restated)

The Circuit Court erred, as did the District Court, in failing and refusing to require the train porters to give security, as required by Rule 65(c) of the Federal Rules of Civil Procedure, in a sum sufficient to protect the railroad petitioners from the claims of the brakemen which have accrued since June 30, 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction.

The temporary restraining order (R. 16-18) which the train porters procured on June 24, 1946, and the temporary injunction (R. 160-163) which they procured on March 5, 1947, have compelled the railroad petitioners to continue using train porters, as well as other employees, in the performance of the disputed work since June 30, 1946. Except for those injunctive orders, these petitioners at midnight on June 30, 1946, would have discontinued using train porters to perform said work (R. 250). Because train porters have been so used, claims of the brakemen, since June 30, 1946, are accruing at the rate of $514.90 per day (R. 542). The potential liability of the railroad petitioners was $78,779.70 when the District Court on November 30, 1946, overruled (R. 75) their motion to increase the amount of the temporary restraining order bond from $500.00 to $75,000.00 (R. 42-52). The potential liability of these petitioners totaled $140,052.80 when the District Court on March 29, 1947, overruled (R. 183) the motion (R. 176-180) of these petitioners to increase the amount of the

temporary injunction bond from $500.00 to $200,000.00 or to an amount which, under the evidence, would fully protect the railroad petitioners against the payment of such costs and damages as they might suffer or incur if they or either of them were found to have been wrongfully enjoined or restrained. And the potential liability of the railroad petitioners will be $329,536.00 on March 31, 1948.

The insufficiency of the temporary restraining order bond and the temporary injunction bond was urged before the Circuit Court in Points 3, 4, 5 and 6 reading as follows:

> "3. The temporary injunction should be dissolved because it was issued in violation of Rule 65(c) of the Federal Rules of Civil Procedure which prohibits the issuance of a temporary injunction except upon the giving of security by the applicant 'for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained' ".
>
> "4. In requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, the District Court did not exercise the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".
>
> "5. If the District Court exercised any discretion in requiring of plaintiffs a $500.00 temporary restraining order bond and a $500.00 temporary injunction bond, such action was arbitrary, capricious, unreasonable, and constituted an abuse of the discretion contemplated by Rule 65(c) of the Federal Rules of Civil Procedure".
>
> "6. Appellees should be required to give security in a sum sufficient to protect appellants from the claims of the brakemen which have accrued since June 30,

> 1946, and which are now accruing, at the rate of $514.90 per day solely because of the temporary restraining order and the temporary injunction".

The Circuit Court did not pass upon these points. Except to state that petitioners complained of the terms upon which the temporary injunction was issued [R. 704; *164 F. (2d) 9*], that Court made no reference to the inadequacy of the temporary restraining order bond and the temporary injunction bond. The Court, however, did make this general observation:

> "* * * the temporary injunction, insofar as it runs against the railroads, was induced solely by the court's conclusion that the trainmen were guilty of past and threatened tortious conduct, wrongfully coercing the railroads into their proposed action, which it considered enjoinable. It is clear from the record that no injunction would have been issued against the railroads except upon that consideration and such was the theory of the plaintiffs' case as against the railroads" [R. 704-705; *164 F. (2d) 9*].

Regardless of the reason for the temporary restraining order and the temporary injunction against these petitioners, they were and are entitled to the protection contemplated by Rule 65(c) of the Federal Rules of Civil Procedure. This protection has been denied them in the instant case.

Potential Damages Are Not Speculative or Remote

In resisting an adequate bond in the Circuit Court, the train porters asserted that the claims of the brakemen are "fantastic" and "ridiculous" and that petitioners "have full opportunity for judicial review of any order made

by the Adjustment Board" (Train Porters' Brief, pages 58-59). Unfortunately, the National Railroad Adjustment Board and the Courts do not share these views.

As above stated, the First Division of the National Railroad Adjustment Board, in four awards against the Southern Pacific, Texas and Pacific, and Santa Fe, has held (a) that work similar to that now in controversy belongs to brakemen, (b) that the use of train porters in the performance of such work is a violation of the seniority rights of brakemen, and (c) that the claims and complaint of the brakemen should be sustained (Exhibits W, X, Y and Z to Stipulation of Facts, not printed; R. 220, 223, 655; Exhibit W, pages 1-2, 18; Exhibit X, pages 1, 23; Exhibit Y, pages 1, 35; Exhibit Z, pages 1, 28). And in one of those awards (Exhibit W) the Board, by its labor members and Referee James B. Riley, sustained against the Santa Fe money claims of four individual brakemen and claims "in all other instances of similar nature now on file" (Exhibit W, pages 1, 18). The claims against the Santa Fe in that case were as "fantastic" and as "ridiculous" as the claims which the brakemen have asserted and will assert against petitioners but that did not deter the Referee and the labor members of the Board. Acting for the Board, as a majority, those gentlemen entered an award sustaining a claim for each of five men in excess of 300 miles, or a day's pay, because each of them on only one occasion handled the switches and gave the signals necessary to place their respective trains in side tracks (Exhibit W, pages 2, 18). In addition, as above stated, the Board in that award likewise sustained the claim "that

like settlement shall be made in all instances of similar nature now on file" (page 18). In view of that award, it is more than idle for the train porters to brand as "fantastic" the claims filed and which will be filed against petitioners, and for the train porters to term "ridiculous" the idea that petitioners "would have to pay a full day's wage to a Trainman, who was not there, because a Porter threw a switch on a designated run" (Train Porters' Brief, page 58).

But, declared the train porters, petitioners "have full opportunity for judicial review of any order made by the Adjustment Board, with respect to any of these claims" (Train Porters' Brief, pages 58-59). This statement is not supported by the decisions.

The Railway Labor Act provides that the division of the Adjustment Board which makes an award in favor of a petitioner,—

> "shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named" [45 U. S. C. A. Sec. 153(o)].

The Act also provides that if the carrier does not comply with said order, "the petitioner, or any person for whose benefit such order was made" may file suit to enforce the same, in which event the findings and order of the division of the Adjustment Board "shall be prima facie evidence of the facts therein stated" [45 U. S. C. A. Sec. 153(p)]. Construing this statutory provision, the United

States Circuit Court of Appeals for the District of Columbia by Associate Justice Rutledge, who is now an Associate Justice of this Court, declared that "The Act permits, but does not require, the employee to bring an enforcement suit", *Washington Terminal Co. v. Boswell, 124 F. (2d) 235, 242, footnote 13;* affirmed by divided Court, *319 U. S. 732.* This holding was made despite the argument of the Terminal Company that its employees would "elect not to institute enforcement suits, but to rely upon their economic bargaining power, that is, the right to strike, to secure enforcement or acceptance of awards" and that thereby the Terminal Company would be "deprived of its day of defense, and so of its only day in Court" [*124 F. (2d) 246*]. In disposing of this phase of the case, the Circuit Court pointed out that this was an "unsupported and argumentative assertion" (page 246), but concluded:

> "Finally, even if the argument were more persuasive factually, it is hardly sufficient to establish the unconstitutionality of the legislation. The Railway Labor Act was designed, not to outlaw the right to strike, but merely to prevent the necessity for its exercise. That it has done, as the results attest. The argument assumes that a strike, or threat of one, to secure acceptance of an award would be unlawful. That it would be so has not been established, and the question need not now be determined. Whether such action would be lawful or unlawful, the mere possibility that employees may resort to it rather than to suit is not enough to make the latter inadequate constitutionally as protection for the carrier's rights. The weight of that possibility is properly within the discretion of Congress in determining whether the initiative in litigation shall be given to one party or the other, particularly where as here it has given no final or conclusive effect, as against the party put upon

> the defensive, to the cause of action to be asserted. The fact that one party to a dispute which is litigable may undertake to settle it illegally does not render a legal remedy, adequate within itself, inadequate [*124 F. (2d) 247*].

This opinion may explain why the Brotherhood of Railroad Trainmen was emboldened to resort to a strike vote on the Southern Pacific to enforce the above mentioned awards against that Company (R. 617-618, Exhibit X and Y to Stipulation of Facts, not printed; R. 220, 223, 655), and why the witness for the Brotherhood of Railroad Trainmen in this case frankly admitted that the Brotherhood would resort to a strike vote against petitioners to enforce any award which might be rendered against them (R. 619).

The Circuit Court in the *Terminal Company case* went further. It declared that the method of review provided in the Railway Labor Act "was intended to be exclusive" [*124 F. (2d) 240*]; it would not permit the Terminal Company to test the validity of the award by declaratory judgment (page 251); and it announced the principle that "a carrier, consistently with the Railway Labor Act", cannot "maintain a suit in equity to set aside an Award or enjoin its enforcement" (page 251).

It is obvious from the foregoing that petitioners do not have, as contended by the train porters, "full opportunity for judicial review of any order made by the Adjustment

Board, with respect to any of these claims" (Train Porters' Brief, page 59). But suppose they did. What chance would petitioners have to set aside the order? Again we quote from the *Terminal Company case:*

> "The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony" [*124 F. (2d) 241*].

These quotations from the *Terminal Company case* show the difficulty, if not impossibility, of setting aside an award or order of the National Railroad Adjustment Board. Furthermore, if court review were possible, the chances of overturning an award or order would be extremely remote because this Court has held that an award of the Board is more than an advisory opinion, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 720-721,* and because of the tendency of this Court to sustain an award of the Board upon a "factual question" which "is intricate and technical" because rendered by "an agency especially competent and specifically designated to deal with it", *Order of Railway Conductors v. Pitney, 326 U. S. 561, 567.*

It is clear from the foregoing that the possibility of petitioners being required to pay the claims which have been filed and which will be filed against them by the brakemen is neither speculative nor remote. On the contrary, the District Court found that such damages "might and doubtless will accrue to the corporate defendants" (R. 639). This being so, the District Court and the Circuit Court erred in failing or refusing to require the train porters to give petitioners security for the payment of such damages, which approximate $514.90 per day for each day since June 30, 1946 (R. 73, 542), the date on which petitioners would have discontinued using train porters in the performance of the work in controversy ex-

cept for the temporary restraining order and temporary injunction which have been issued in this case.

WHEREFORE, petitioners pray, as in their foregoing petition, that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court in the three consolidated causes, Nos. 13564 and 13565 entitled "Missouri-Kansas-Texas Railroad Company, et al. versus A. Phillip Randolph, et al.", and No. 13566 entitled "R. D. Wood, et al. versus A. Phillip Randolph, et al." to the end that said consolidated causes may be reviewed and determined by this Court as provided by the statutes of the United States; that the judgment of the Circuit Court which ordered the dissolution of the temporary injunction against these petitioners be affirmed; that the Court reverse that portion of the judgment of the Circuit Court which holds or implies that this controversy should be taken to the National Railroad Adjustment Board or to the National Mediation Board; that the Court declare that there is no dispute between these petitioners and their train porters which can be taken either to the National Railroad Adjustment Board or the National Mediation Board; that the Court overrule the action of the District Court and the Circuit Court in refusing and failing to require the train porters to give ade-

quate security as required by Rule 65(c) of the Federal Rules of Civil Procedure; that the Court enter an order requiring the train porters to give such security; and for all other and further relief to which petitioners may be entitled.

Dated March 30, 1948.

Respectfully submitted,

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FILE COPY

No. 711

In the

Supreme Court of the United States

OCTOBER TERM, 1947

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Petitioners,

v.

A. PHILLIP RANDOLPH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

REPLY OF PETITIONERS TO OPPOSING BRIEF OF RESPONDENTS R. D. WOOD, ROY ELLIOTT LANG, JOHN WILLIAM DEARING, HOLLIS ORVAL THOMPSON, AND BROTHERHOOD OF RAILROAD TRAINMEN.

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To the Honorable, the Supreme Court of the United States:

The opposing brief is filed by the brakemen respondents. There is no opposition from the train porters.

Reply to Respondents' Point I.

The brakemen respondents would divorce the Circuit Court's opinion from its judgment. This they cannot do because the judgment remands the causes "for further

proceedings in accordance with the opinion" (R. 708). It follows that errors in the opinion are errors in the judgment. That such errors exist is clearly revealed by the petition and supporting brief.

Erroneously applying the decision of this Court in *Order of Railway Conductors v. Pitney, 326 U. S. 561*, the Circuit Court declared that the brakemen's contentions "are fully sustained" [R. 699; *164 Fed. (2d) 6*]. Immediately preceding this pronouncement, the Circuit Court thus stated one of the contentions of the brakemen:

> "They contend that the court should have stayed exercise of its power to issue injunctional orders and should have relegated the parties to the tribunals specifically provided by Congress in the Railway Labor Act for mediation and for determining the interpretation and application of collective bargaining contracts such as are shown to be involved in this case, in order to finally settle the labor dispute arising out of them, and that the issuance of the temporary injunction in the first instance was erroneous" [R. 699; *164 Fed. (2d) 6*].

Thus the Circuit Court would send the parties to the National Railroad Adjustment Board for a decision of what that Court termed "the real dispute here involved, whether train porters should be permitted to perform the items of work in question or whether railroad trainmen have the exclusive right" to perform such work [R. 700; *164 Fed. (2d) 7*]. But that is not the real dispute here involved because petitioners have already taken the legal steps necessary to withdraw the disputed work from the

train porters* and their right to perform such work is no longer a question which can be submitted to the National Railroad Adjustment Board. The train porters do not challenge the right of petitioners to cancel their contract and to negotiate a new contract which expressly excludes the work in controversy. They merely contend that this right should not be exercised by petitioners because their action has been induced by the wrongful acts of the brakemen. The sole question, therefore, is whether or not these petitioners should be enjoined because of the alleged wrongful acts of the brakemen. This is purely a question of law which only the courts can answer. The power to answer it does not repose in the National Railroad Adjustment Board or in the National Mediation Board.

Furthermore, the Circuit Court misconstrued and misapplied the decision of this Court in the *Pitney case*. That case merely involved the proper interpretation of conflicting agreements. Unlike the present case, the railroad company in the *Pitney case* had not sought "after due notice and in accord with the provisions of the Railway Labor Act" [R. 698; *164 Fed. (2d) 6*], to cancel one contract and to negotiate a new contract expressly eliminating the work

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* The Circuit Court so found:

"The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698; 164 Fed. (2d) 5-6].

"The legal right of the railroads to proceed as they have done and intend to do in respect to their contract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; 164 Fed. (2d) 9].

in controversy. These facts distinguish the *Pitney case* from the case at bar and show why that case does not control this litigation and why there is no present labor dispute within the jurisdiction of the National Railroad Adjustment Board or the National Mediation Board.

We respectfully submit that this Court should correct the error of the Circuit Court in misconstruing and misapplying the decision of this Court in the *Pitney case* and that this Court should correct the error of the Circuit Court in sending the parties to the National Railroad Adjustment Board for decision of a question which is nonexistent.

Reply to Respondents' Point II.

The Circuit Court stated: "Insofar as the railroads propose to terminate the existing contract with the porters and to change their working conditions, the statute gives the porters the right to resort to the Mediation Board * * *" [R. 703; *164 Fed. (2d) 8*]. It is difficult to reconcile this statement with these previous holdings of the Circuit Court:

> "The railroads were about to accede to the demands of the trainmen and intended, after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156, to cancel the contract with the train porters on which the train porters based their claim of right to do the specific items of train operating work and to negotiate a new contract excluding such items" [R. 697-698; *164 Fed. (2d) 5-6*].
>
> "The legal right of the railroads to proceed as they have done and intend to do in respect to their con-

tract with the train porters, is clearly accorded them in the statute, 45 U. S. C. A. Sec. 152 Seventh, and cannot be questioned" [R. 705; *164 Fed. (2d) 9*].

As heretofore stated, the judgment remands the causes "for further proceedings in accordance with the opinion" (R. 708). The opinion, and therefore the judgment, is erroneous if it means that the train porters may now resort to the National Mediation Board.

The Circuit Court correctly found that the petitioners proposed to cancel their contract with the train porters and to negotiate a new contract expressly excluding the work in controversy "after due notice and in accord with the provisions of the Railway Labor Act, 45 U. S. C. A. Sec. 152 Seventh and Sec. 156" [R. 698; *164 Fed. (2d) 6*]. Section 152 Seventh of that Act authorizes changes in rates of pay, rules, or working conditions, as embodied in agreements, provided such changes are made "in the manner prescribed in such agreements or in Section 156 of this title". In attempting to withdraw the disputed work from the train porters, the petitioners proceeded both "in the manner prescribed" in the train porters' agreement (R. 233-234) and in the manner provided in Section 156. Changes made in accordance with an agreement are not subject to review by the National Mediation Board, and proposed changes under Section 156 may be made at the expiration of ten days from the termination of conferences, if there has been no request for or proffer of the services of the Mediation Board. In the instant case, conferences terminated on June 7, 1946 (R. 250) and the services of

the Mediation Board were not requested by the parties (R. 493) nor proffered by the Board (R. 560). It necessarily follows that the train porters have no right to resort to the National Mediation Board and that the Circuit Court erred in declaring that "the statute gives the porters the right to resort to the Mediation Board" [R. 703; *164 Fed. (2d) 8*]. We respectfully submit that this error should be corrected.

Reply to Respondents' Point III.

The failure and refusal of the District Court to comply with the security provisions of Rule 65(c) of the Federal Rules of Civil Procedure were clearly presented to the Circuit Court in petitioners' points 3, 4, 5, and 6 (Petition, pages 8-9; Supporting Brief, pages 46-47). And the last three points were urged as independent grounds of error, not merely in support of petitioners' contention that the temporary injunction should be dissolved. The Circuit Court failed and refused to correct these errors.

When inferior courts fail and refuse to comply with rules promulgated by this Court [Rule 65(c)] and with the federal statutes (38 Stat. 738; 28 U. S. C. A. Sec. 382), to the detriment of litigants (supporting brief, pages 62-71), no citation of authority is needed to support this Court's right of review. And such review cannot be thwarted even though the parties litigant do not specify the corrective measures. That is the prerogative of this

Court which, we respectfully submit, should be exercised in the instant case.

WHEREFORE, petitioners pray, as in their petition, that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court in the three consolidated causes, Nos. 13564 and 13565 entitled "Missouri-Kansas-Texas Railroad Company, et al. versus A. Phillip Randolph, et al.", and No. 13566 entitled "R. D. Wood, et al. versus A. Phillip Randolph, et al." to the end that said consolidated causes may be reviewed and determined by this Court as provided by the statutes of the United States; that the judgment of the Circuit Court which ordered the dissolution of the temporary injunction against these petitioners be affirmed; that the Court reverse that portion of the judgment of the Circuit Court which holds or implies that this controversy should be taken to the National Railroad Adjustment Board or to the National Mediation Board; that the Court declare that there is no dispute between these petitioners and their train porters which can be taken either to the National Railroad Adjustment Board or the National Mediation Board; that the Court overrule the action of the District Court and the Circuit Court in refusing and failing to require the train porters to give adequate security as required by Rule 65(c) of the Federal Rules of Civil Pro-

cedure and by the Federal Statutes (38 Stat. 738; 28 U. S. C. A. Sec. 382); that the Court enter an order requiring the train porters to give such security; and for all other and further relief to which petitioners may be entitled.

Dated April 29, 1948.

Respectfully submitted,

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BRIEF OF RESPONDENTS R. D. WOOD, ROY ELLIOTT LANG, JOHN WILLIAM DEARING AND HOLLIS ORVAL THOMPSON, AND BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

A complete statement of the facts and of the real subject matter involved in this cause is set out in the brief filed on behalf of these respondents in this Court in Docket

No. 661 in opposition to the petition for writ of certiorari and supporting brief of A. Phillip Randolph *et al.*, petitioners therein. Because the points, argument and authorities appearing in said brief in large part answer and dispose of the questions presented in the petition and supporting brief of petitioners, Missouri-Kansas-Texas Railroad Company *et al.*, these respondents respectfully request leave to adopt as a part of this brief all of their opposition brief filed in Docket No. 661. We feel this will avoid needless repetition, and at the same time, will permit us to address ourselves directly to such remaining questions presented by the instant petition and supporting brief as may seem to require discussion.

SUMMARY OF ARGUMENT.

POINT I.

"Question A" Presented in the Petition Is Nonexistent and Does Not in Any Manner Arise on the Record in This Case.

Rule 65 (c), Federal Rules of Civil Procedure.

Order of Railway Conductors of America v. *Pitney et al.*, 326 U. S. 561, 66 S. Ct. 322.

Railway Labor Act, Title 45, U. S. C. A., Sec. 151 *et seq.*

Norris-LaGuardia Act, Title 29, U. S. C. A., Sec. 101 *et seq.*

POINT II.

As to Petitioners, "Question B" Presented in the Petition Does Not Arise on the Record in This Case.

Railway Labor Act, Title 45, U. S. C. A., Sec. 151 *et seq.*

POINT III.

"Question C" Presented in the Petition Presents No Question Arising upon the Record in This Case That Calls for a Review by This Court.

Rule 65 (c), Federal Rules of Civil Procedure.

CONCLUSION.

The Petition Should Be Denied.

Rule 38, Rules of the Supreme Court, Title 28, U. S. C. A.

ARGUMENT.

POINT I.

"Question A" Presented in the Petition Is Nonexistent and Does Not in Any Manner Arise on the Record in This Case.

The petition alleges that there are three questions presented on the record in this case which call for a review by this Court on its writ of certiorari to the Eighth Circuit Court of Appeals. We think a reading of the petition serves to illustrate the difficulty of discerning what, if any, substance there is to any of these three purported questions. The petitioners apparently have sought to relate the questions A, B, and C set out in the petition to the principal points which they urged in the Eighth Circuit Court of Appeals on their appeals from the orders and judgment of the District Court. These points which the petitioners urged on appeal are set out among other places in the petitioners' supporting brief at pages 46 and 47 thereof. Briefly these points were that the District Court erered in granting a temporary injunction against petitioners (a) because the respondents, A. Phillip Randolph *et al.*, neither pleaded nor proved a cause of action against petitioners and (b) because the petitioners had a legal right to cancel their contract with the Train Porters. A third ground urged as error on the part of the District Court and warranting a dissolution of the temporary injunction was that the District Court, in not requiring the Respondents, A. Phillip Randolph *et al.*, to give what the petitioners deemed to be adequate security, had abused its discretion in the application of Rule 65 (c) of the Federal Rules of Civil Procedure.

After reading and analyzing the petition and the arguments presented in the supporting brief, we cannot escape the conclusion that the petitioners plainly admit that the judgment of the Eighth Circuit Court of Appeals dissolving the temporary injunction in this case is unquestionably correct. The petitioners' complaint seems to be limited to a quarrel with the opinion of the Circuit Court. In that connection, petitioners seem to register their complaint solely on the ground that the Circuit Court did not, in its opinion, rule that as to them the temporary injunction should be dissolved because the District Court had abused its discretion in the application of Rule 65 (c) of the Federal Rules of Civil Procedure. We find no suggestion of an authority in the supporting brief that this situation, so far as the record in this case is concerned, presents any question for review by this Court.

The fundamental point raised by petitioners in the Circuit Court, namely that no case was pleaded or proved against petitioners, and further, that petitioners had the legal right to cancel their contract with the Train Porters and that the temporary injunction as to them should therefore be dissolved was squarely passed upon by the Circuit Court and decided in favor of the petitioners. The Circuit Court's judgment (R. 705-708) speaks the fact on this proposition and its opinion (R. 695-705) illustrates it.

The Circuit Court's finding that the respondents, A. Phillip Randolph *et al.*, had neither pleaded nor proved a case against the petitioners was predicated upon its finding that the respondents, A. Phillip Randolph *et al.*, had not pleaded nor proved a case of wrongful or tortious conduct against these respondents. In other words, the Circuit Court found that these respondents had in all respects conducted themselves in a lawful manner in asserting the legal rights in question against the petitioners.

This is an important consideration which is apparently overlooked by the petitioners. With this fundamental premise in mind, it must be apparent that as to the petitioners, the question as to whether or not they should be enjoined, because of the alleged wrongful acts of the Brakemen, which in their petition is what "Question A" is restricted to, is nonexistent. The Circuit Court held that the acts of these respondents were not wrongful and for that reason no case for a temporary injunction was made against either these respondents or against the petitioners. "Question A," therefore, is wholly unrelated to any of the jurisdictional questions which were raised by these respondents, not only in the District Court, but in the Circuit Court, and which the Circuit Court ruled in favor of these respondents. In so ruling the jurisdictional questions the Circuit Court followed the controlling decisions of this Court, as exemplified by this Court's opinion in *Order of Railway Conductors of America* v. *Pitney et al.*, 326 U. S. 561, 66 S. Ct. 322.

So far as "Question A" as presented in the petition might in any way affect petitioners, the petitioners got all of the relief they asked for in the Eighth Circuit Court of Appeals.

Petitioners do seem to enlarge upon "Question A" when they say that "This Court is called upon to decide (a) whether or not the courts have jurisdiction to determine this question or whether it presents a labor dispute which must be referred to the National Railroad Adjustment Board or to the National Mediation Board; and (b) whether, as held by the Circuit Court, this case is controlled by the decision of this Court in *Order of Railway Conductors of America* v. *Pitney et al.*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318" (Petition pp. 18, 19). In view of the record in this case, it is impossible for us to understand this statement of the question, or to understand that

the statement presents any question at all. Is it possible that the petitioners have completely misinterpreted or misunderstood the judgment and opinion of the Eighth Circuit Court of Appeals? In the District Court, as well as on their appeal to the Eighth Circuit Court of Appeals, these respondents raised certain jurisdictional questions. One was that the District Court had no jurisdiction over the subject matter of the action because it consisted of a labor dispute within the meaning of the applicable provisions of the Norris-LaGuardia Act. The Circuit Court of Appeals ruled that question in favor of these respondents. Certainly, these respondents have never contended, and do not now contend, that the National Railroad Adjustment Board or the National Mediation Board has jurisdiction to determine whether the disputes in question came within the purview of the Norris-LaGuardia Act, restricting the District Court's power to render injunctive relief.

Another jurisdictional point which these respondents urged was that the subject matter of this action involved jurisdictional labor disputes which were justiciable solely by the appropriate tribunals set up under the Railway Labor Act and not by the District Courts. On this question these respondents were likewise sustained by the Circuit Court of Appeals. As heretofore pointed out, neither of these jurisdictional questions have anything whatsoever to do with the question as to whether the Porters pleaded or proved a case against the petitioners predicated on alleged unlawful acts of these respondents and the alleged illegal attempt of petitioners to cancel the Porters' contract. The opinion of the Circuit Court of Appeals not only squarely holds that the injunction should have been dissolved because the District Court was without jurisdiction of the subject matter, in view of the statutes mentioned and the controlling decisions of this Court, but it also held that it should be dissolved as to these respondents upon the

ground that the Porters had neither pleaded nor proved a case against these respondents in that the acts of these respondents complained of by the Porters were not unlawful. Based on this and its further finding that the petitioners had a legal right to cancel their contract with the Porters, the Circuit Court of Appeals held that the injunction should also be dissolved as to the petitioners.

So far as the jurisdictional question which involved the Railway Labor Act is concerned and which is raised solely by these respondents, neither the petitioners nor the Porters can point to anything in either the pleadings or the record in this case that distinguishes the case from the Pitney case. Where this question is involved, there is very plainly a question of interpretation and application of conflicting agreements. The Porters not only claim the right to a continuing contract with the petitioners, but claim a contractual right thereunder to perform the Services in Controversy. This so-called contractual right, as we have pointed out in the opposition brief previously filed in Docket 661, is denied by the petitioners. The Trainmen claim, as against the Railroad, the exclusive right under existing contract, custom and usage, to perform the same Services in Controversy. The petitioners have denied this claim. There is, therefore, obviously a situation which does involve conflicting agreements between the petitioners and the Porters on the one hand and the petitioners and the Trainmen on the other hand, and claims by the Porters and by the Trainmen, involving the same sphere of railroad activity. The determination of whether the Porters are right, or whether the Trainmen are right, or whether the petitioners are right, necessarily involves an interpretation and application of the conflicting agreements.

As has been demonstrated in the brief of these respondents in Docket 661 and as was held by the Eighth

Circuit Court of Appeals in its opinion, these matters are justiciable solely by the tribunals established under the Railway Labor Act.

With respect to the jurisdictional point involving the application of the Norris-LaGuardia Act, the Circuit Court's ruling thereon is neither seriously questioned nor briefed by petitioners. Furthermore, petitioners should not be heard to complain of the Circuit Court's ruling on these jurisdictional questions for they have in no way been harmed thereby.

POINT II.

As to Petitioners, "Question B" Presented in the Petition Does Not Arise on the Record in This Case.

"Question B" presented in the petition does not state any question. The language employed is in the form of an assertion that the Circuit Court erred in declaring that the Porters have a right to resort to the Mediation Board. The assertion, neither by implication nor otherwise, presents any question so far as the petitioners are concerned that calls for a review by this Court on certiorari. Certainly, whether the Porters have a present right to go to the Mediation Board in no way affects the petitioners in this case. The petitioners simply asked for a dissolution of the temporary injunction in this case and that is what the Circuit Court's judgment gave to the petitioners. How, then, can the petitioners be heard to complain in this Court on the question as to whether or not the Porters have a present right to go to the Mediation Board? If the Porters have no present right to go to the Mediation Board, that fact is solely due to the wilful neglect of the Porters and the petitioners as well, in that neither of them saw fit to avail themselves of that remedy, which they both had a right to under the provisions of Section 156 of the Railway Labor

Act. This question has been fully discussed and disposed of in our brief in opposition to the petition of the Porters in Docket 661 in the discussion on the question of the adequacy of the legal remedy.

POINT III.

"Question C" Presented in the Petition Presents No Question Arising upon the Record in This Case That Calls for a Review by This Court.

"Question C" presented in the petition certainly cannot be said to be a proper question arising upon the record in this case, calling for a review by this Court on its writ of certiorari. The complaint inherent in this question is that the District Court erred in not requiring the Porters to give an adequate bond as security for the petitioners. Time and again in the argument in petitioners' supporting brief, they discuss this "Question C" in relation to their Points III, IV, V and VI, which they urged on their appeals to the Circuit Court (see petitioners' supporting brief, pages 62, 63). As to Points III, IV and V, each was urged in the Circuit Court as a ground for dissolving the temporary injunction and involved the question as to whether or not the District Court had abused its discretion under Rule 65 (c) of the Federal Rules of Civil Procedure. Whether this question could be properly raised on the appeals is a matter that we need not discuss here. It is sufficient to say that the Circuit Court, by its judgment, did grant the relief which the petitioners prayed for, to-wit, a dissolution of the temporary injunction and, as illustrated by its opinion and as previously pointed out under Point I of this brief, upon the very fundamental ground that the Porters had failed to either plead or prove a claim for injunctive relief against the petitioners. Having so held, it was wholly unnecessary to the Circuit

Court's decision to pass on any question as to whether or not the District Court had abused its discretion under Rule 65 (c) and, if so, whether such abuse was prejudicial error warranting a dissolution of the injunction.

Therefore, in this respect, "Question C," read in the light of the Circuit Court's judgment, answers itself and presents nothing arising on the record in this case for this Court to review.

"Question C," considered in relation to Point VI, which the petitioners state was urged in the Circuit Court, not only presents nothing arising upon the record for review by this Court, but, to say the least, presents a novelty. Petitioners say that the Circuit Court not only should have dissolved the injunction, but should have ordered the Porters to give security in a sum sufficient to protect petitioners from the claims of these respondents that had accrued against petitioners on June 30, 1946. In other words, they desired a bond from the Porters, retrospective in effect. No authority was cited by the petitioners in the Circuit Court and no authority is cited in the supporting brief in support of petitioners' contention. No guide is offered by the petitioners by which the Circuit Court could have made any such order that would have been enforcible or effective against the Porters. The Circuit Court granted the primary relief prayed for by petitioners, namely, the dissolution of the injunction, and in such circumstances, any order on the Porters requiring the Porters to give retrospective security would have been anticlimax. Such an order would obviously have been unenforcible.

Surely not even the petitioners are naive enough to believe that after the Circuit Court had dissolved the injunction, the Porters would be so foolish as to voluntarily put up retrospective security. There could be no penalty inflicted upon the Porters for refusing to comply. In the last analysis, therefore, what the petitioners say with re-

spect to "Question C" is that the Circuit Court erred in not issuing a useless and unenforcible order.

It occurs to us that the questions which the petitioners now seek to present and urge upon this Court as grounds for taking this case are the product of an afterthought and some degree of imagination. Were this not so, would it not have been highly proper for the petitioners to have challenged the Circuit Court of Appeals' attention to the matters now complained of by an appropriate motion for rehearing. Petitioners did not file a motion for rehearing in the Circuit Court of Appeals.

CONCLUSION.

The petition presents no question of a conflict between the decision of the Eighth Circuit Court of Appeals and the decision of another Circuit Court of Appeals on any phase of the subject matter involved in this case. Neither does the petition present any question with respect to a decision by the Eighth Circuit Court of Appeals of an important question of local law in any way probably in conflict with applicable local decisions. Neither does the petition present any question as to whether the Eighth Circuit Court of Appeals decided any important question of Federal Law which has not been, but should be settled by this Court. Neither does the petition present any question as to a decision by the Eighth Circuit Court of Appeals of any Federal question in a way probably in conflict with any applicable decision of this Court and neither does the petition present any question involving a departure by the Circuit Court from the accepted and usual course of judicial proceedings, or any question that it has so far sanctioned such a departure by a lower court as to call upon an exercise of this Court's power of supervision.

In addition, the petition does not present any special or important reason of any kind or character for the granting by this Court to petitioners a review of this case on writ of certiorari (Rule 38, Rules of the Supreme Court, Title 28, U. S. C. A.). For all of the reasons and under all of the applicable authorities set out in the brief of these respondents filed in Docket 661, and for all of the reasons hereinbefore stated, these respondents respectfully submit that the petition for this Court's writ of certiorari should be denied.

Respectfully submitted,

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